MISSISSIPPI LAW JOURNAL

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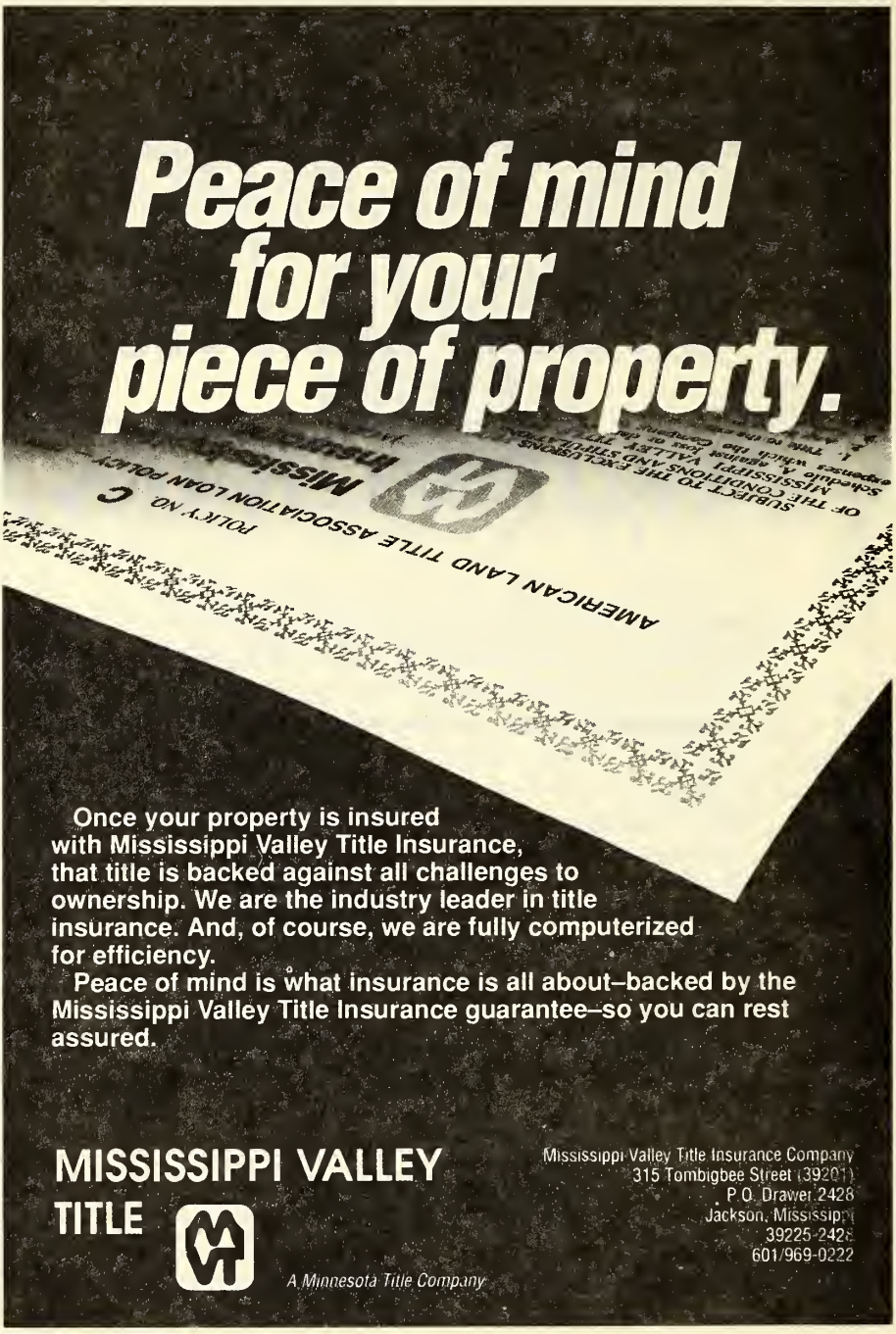

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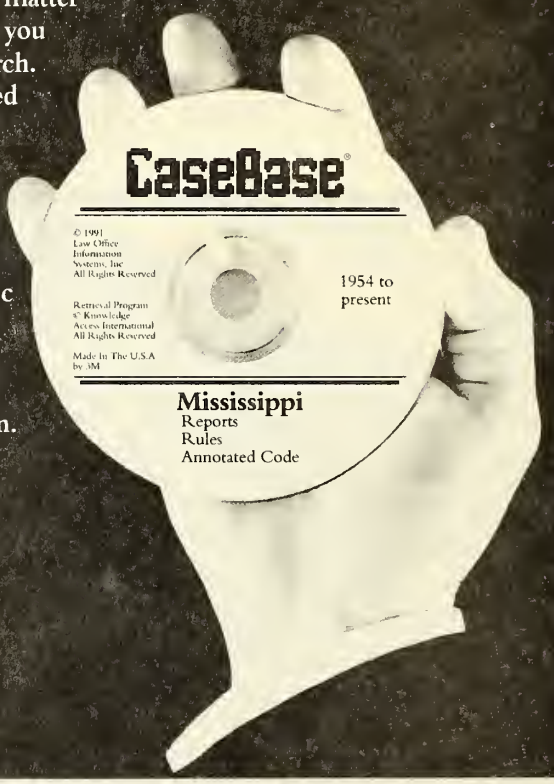

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MISSISSIPPI LAW OF INTESTATE SUCCESSION, WILLS, AND ADMINISTRATION AND THE PROPOSED MISSISSIPPI UNIFORM PROBATE CODE: A COMPARATIVE ANALYSIS

Robert A. Weems[*]
Katherine L. Evans[**]

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I. INTRODUCTION

At the 1992 session of the Mississippi Legislature a bill was introduced that, if enacted, will repeal almost all of Mississippi's statutes dealing with Descent and Distribution[1], Wills,[2] Administration of Testate and Intestate Estates,[3] and Guardians and Conservators.[4] The House Bill was passed by House Judiciary "A" Committee and was sent to the entire House for a vote. The Bill was withdrawn prior to a vote because of concerns about the effect of some of the provisions, as well as a general unfamiliarity with the bill.[5] The Senate Judiciary Committee decided to postpone action on the Senate version of the bill until action in the House was completed. Proponents of the Bill, which is entitled the Mississippi Uniform Probate Code (MUPC), plan to prefile the bill in late 1992 and expect enactment by the 1993 Mississippi Legislature.

It would be difficult to exaggerate the scope of the MUPC. It is 232 pages long and contains 336 sections. A major effort is required just to read it, much less understand it.

Many, if not most, Mississippi lawyers and judges, for understandable reasons, have not been able to make this effort. Consequently, they have not been able to develop an informed opinion as to whether the MUPC should be enacted, and thus have not made their views known to their representatives in the legislature. Such input is extremely important because most legislators, not being lawyers, could not possibly understand this massive and intricately drafted bill and the changes it would make in the law of Mississippi.

The purpose of this article is to inform lawyers and judges who have not studied the MUPC of the significant changes

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[1] MISS. CODE ANN. §§ 91-1-1 *et seq.* (1972 & Supp. 1992).

[2] MISS. CODE ANN. §§ 91-5-1 *et seq.* (1972 & Supp. 1992).

[3] MISS. CODE ANN. §§ 91-7-1 *et seq.* (1972 & Supp. 1992).

[4] MISS. CODE ANN. §§ 93-13-1 *et seq.* (1972 & Supp. 1992).

[5] Letter from J. Lee Woodruff, Committee Secretary, to members of Uniform Probate Code Committee, Estate and Trusts Section, Miss. Bar (March 19, 1992) (on file with authors).

that it would make in the law of Mississippi in the areas of Intestate Succession, Wills, and Administration of Testate and Intestate Estates. No effort has been made to include every change, or to exhaustively discuss all of the details of the changes that are addressed. To do either would mire the reader in details that would be much like reading the bill itself. The idea is to try to hit the high points.

What follows is not intended to be an argument for or against the enactment of the MUPC. That is a matter for every person's reckoning. The motivating thought behind this article is that a century of Mississippi statutory and case law, and the centuries of common law that produced them, should not be repealed and replaced until the replacement is at least substantially understood.

II. Origin and History of the Uniform Probate Code

The MUPC is, as the name implies, based on the Uniform Probate Code. The UPC was first proposed for adoption by the states in 1969.[6] The National Conference of Commissioners on Uniform State Laws adopted it and the American Bar Association approved it.[7] The UPC includes eight articles: I. General Provisions, Definitions and Probate Jurisdiction of Courts; II. Intestacy, Wills and Donative Transfers; III. Probate of Wills and Administration; IV. Foreign Personal Representatives; Ancillary Administrations; V. Protection of Persons Under Disability and Their Property; VI. Nonprobate Transfers on Death; VII. Trust Administration; and VIII. Effective Date and Repealer.[8]

The UPC has been adopted by fifteen states.[9] The adopting states, and the year of their adoption are: Idaho - 1972, Alaska - 1973, Arizona - 1974, Colorado - 1974, Florida - 1975, Minnesota - 1975, Montana - 1975, North Dakota - 1975, Hawaii - 1976, New Mexico - 1976, Nebraska - 1977, Utah - 1977,

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[6] Uniform Probate Code, at III (West 10th ed. 1991).
[7] *Id.*
[8] Unif. Probate Code, at 1-13 (West 10th ed. 1991).
[9] 8 U.L.A. 1 (West Supp. 1992).

Michigan - 1979, Maine - 1981, South Carolina - 1987.[10]

The UPC contains fourteen Uniform Acts which are parts of the UPC but which may be enacted separately as free-standing acts.[11] Many states which have not adopted the entire UPC have adopted one or more of these uniform acts.[12] Also, many states have enacted particular provisions of the UPC.[13] For example, Mississippi's statutory provisions regarding recovery of a decedent's assets in small estates by affidavit are based on provisions in the UPC.[14]

The UPC has been amended seven times since 1969.[15] The most significant changes occurred in 1990 when Article II was revised.[16] This revision made substantial changes in the provisions of the original code with regard to intestate succession, the surviving spouse's elective share, execution of wills, and many other matters.[17] The revised Article II was also approved as the free-standing Uniform Act on Intestacy, Wills, and Donative Transfers.[18] However, to date, no state has adopted the revised Article II or the free-standing act.[19]

Some parts of the UPC are not included in the MUPC.[20] Article VI of the UPC, Nonprobate Transfers on Death, is not in the MUPC.[21] Additionally, the Uniform International Wills Act (Article II, Part 10) and the Uniform Succession Without Administration Act (Article III, Part 3, Sections 312-322) are also omitted from the MUPC.[22] However, with the exception of these deletions and a few relatively minor changes, the

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[10] *Id.*

[11] *Id.*

[12] *See generally* 8A U.L.A. (West Supp. 1992); 8 U.L.A. 1-3 (West Supp. 1992).

[13] *Id.*

[14] MISS. CODE ANN. § 91-7-322 (1972); UNIF. PROBATE CODE § 3-1201, -1202 (West 10th ed. 1991).

[15] UNIF. PROBATE CODE, at IX (West 10th ed. 1991).

[15] UNIF. PROBATE CODE, at 40-42 (West 10th ed. 1991). *See generally* UNIF. PROBATE CODE, at 539-626 (West 10th ed. 1991).

[17] UNIF. PROBATE CODE, at 40-42 (West 10th ed. 1991).

[18] UNIF. PROBATE CODE, at 38 (West 10th ed. 1991).

[19] 8A U.L.A. 144 (West Supp. 1992).

[20] H.B. 921, Reg. Sess. (1992) (Mississippi Uniform Probate Code) [hereinafter MUPC]; *see also* UNIF. PROBATE CODE (West 10th ed. 1991).

[21] MUPC, *supra* note 20.

[22] *Id.*

MUPC is the same as the revised UPC.[23]

III. Significant Differences Between Existing Mississippi Law and the Proposed Mississippi Uniform Probate Code[24]

The MUPC will affect Mississippi law in two ways. First, many of the provisions of the MUPC conflict with present Mississippi statutory and/or case law. This Mississippi law would be discarded and replaced by the provisions of the MUPC. Second, some of the MUPC provisions deal with matters not covered by Mississippi statute or case law. In those areas the MUPC would provide a rule where there is presently no Mississippi law. The following will deal with significant changes of both kinds.

A. Intestate Succession

1. Surviving Spouse

The most significant change the MUPC would make in the Mississippi law of intestate succession is in the amount of the deceased spouse's estate to be inherited by the surviving spouse. Mississippi law gives the surviving spouse a child's share of the estate, i.e. the amount he or she would get if he or she were a child of the decedent. If the decedent had no descendents the surviving spouse would inherit the entire estate.[25]

The surviving spouse's intestate share under the MUPC depends upon which one of five situations exists at the time of the deceased spouse's death.

(1) If the decedent is not survived by any descendents or either parent: The surviving spouse inherits the entire estate.[26]

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[23] *Id.*; *see also* UNIF. PROBATE CODE (West 10th ed. 1991).

[24] The text used for this comparison is the bill designated as Committee Substitute for House Bill No. 921. The bill introduced at the 1993 Legislative session may differ from this bill in some respects.

[25] MISS. CODE ANN. § 91-1-7 (1972).

[26] MUPC, *supra* note 20, § 2-102(1)(i).

(2) If the decedent is not survived by any descendents but is survived by one or both parents: The surviving spouse gets the first $200,000 plus three fourths of the balance of the estate.[27]

(3) If the decedent is survived by descendents, and all of these descendents are also descendents of the surviving spouse, and the surviving spouse has no other descendents: The surviving spouse gets the entire estate.[28]

(4) If the decedent is survived by descendents, and all of these descendents are also descendents of the surviving spouse, and the surviving spouse also has other descendents who are not descendents of the deceased spouse: The surviving spouse gets the first $150,000 plus one-half of the balance of the estate.[29]

(5) If the decedent is survived by descendents, and one or more of these descendents are not descendents of the surviving spouse: the surviving spouse gets the first $100,000 plus one-half of the balance of the estate.[30]

Alternatively, the MUPC gives the surviving spouse the option to elect to take a part of the deceased spouse's *augmented estate* in lieu of the surviving spouse's above defined share of the deceased spouse's intestate estate.[31] The *augmented* estate includes the property in the decedent's intestate estate (that property which passes according to the law of intestate succession) and property in the decedent's *reclaimable* estate, which are other kinds of property owned by the decedent at or prior to death but which do not pass under the law of intestate succession.[32] The surviving spouse's elective share is discussed in more detail in Section III.B.13. Suffice it to say here that the decedent's surviving spouse may be able to receive more than that provided by items (1) - (5) above. The primary purpose of this elective share, as far as intestate succession is concerned, is to prevent a spouse from reducing

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[27] MUPC, *supra* note 20, § 2-102(2).
[28] MUPC, *supra* note 20, § 2-102(1)(ii).
[29] MUPC, *supra* note 20, § 2-102(3).
[30] MUPC, *supra* note 20, § 2-102(4).
[31] MUPC, *supra* note 20, § 2-201(a).
[32] MUPC, *supra* note 20, § 2-202(b).

the surviving spouse's intestate succession inheritance by the use of "will substitutes" such as joint bank accounts with right of survivorship in the name of the spouse and some third person. Mississippi law has no comparable provision, and, except for exempt property and a year's living allowance, current probate law limits the surviving spouse to his or her share of the intestate estate.[33]

2. *Relatives by Consanguinity*

Under Mississippi law, the intestate estate that does not go to the surviving spouse goes to the decedent's descendents by representation. If there is no surviving spouse and there are no descendents, the estate goes to the decedent's parents and brothers and sisters, with children of deceased brothers and sisters having the right of representation. If there are none of the above, the estate goes to the decedent's grandparents, uncles, and aunts, per capita. If there are none of the above, the estate goes to the decedent's next of kin according to the civil law.[34]

The MUPC makes a similar distribution. Descendents, by representation, get whatever part of the estate that does not go to the surviving spouse, or all if there is no surviving spouse.[35] Next in line where there are no descendents are the decedent's parents,[36] and then, if the decedent has no surviving parent, the descendents of the decedent's parents take by representation.[37] If there are none of the above, the estate passes to grandparents and, if they did not survive the decedent, it passes to their descendents by representation, half to the paternal side and half to the maternal side.[38] If there are none of the above, then the estate goes to the next of kin under the civil law, per capita, as is the case under present Mis-

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[33] *See* MISS. CODE ANN. § 91-5-27, -29 (1972).
[34] MISS. CODE ANN. § 91-1-3 (1972).
[35] MUPC, *supra* note 20, § 2-103(1).
[36] MUPC, *supra* note 20, § 2-103(2).
[37] MUPC, *supra* note 20, § 2-103(3).
[38] MUPC, *supra* note 20, § 2-103(4).

sissippi law.[39]

3. Representation

Only descendents of the decedent's children and descendents of the decedent's brothers and sisters are given the right of representation in Mississippi.[40] The MUPC gives the right of representation to all of those people, and also to descendents of the decedent's grandparents, uncles, aunts, first cousins, etc.[41]

In calculating the shares taken through the right of representation, Mississippi law follows a strict per stirpes method; without exception, the descendents share the part their deceased parent would have taken.[42] The MUPC follows the system called "per capita at each generation", which allocates equal shares to those equally related to the decedent.[43]

4. Half-bloods

Under Mississippi law, a half-blood relative cannot inherit by intestate succession if there is a full-blood relative in the same inheritable class.[44] This rule is completely changed by the MUPC and half-bloods are permitted to inherit just as if they were of the full-blood.[45]

5. 120 Hour Rule

The moment of decedent's death is the time for determining intestate succession inheritance rights under Mississippi law. In other words, those persons in the inheritable class who are in being at the moment of the decedent's death inherit,

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[39] MUPC, *supra* note 20, § 2-103(5); MISS. CODE ANN. § 91-1-3 (1972).

[40] MISS. CODE ANN. § 91-1-3 (1972).

[41] MUPC, *supra* note 20, § 2-106(b), (c).

[42] *See, e.g.*, Rodgers v. Rodgers, 67 So. 2d 698, 703-04 (Miss. 1953) (asserting that per stirpes derived from statutory law).

[43] MUPC, *supra* note 20, § 2-106(b), (c).

[44] MISS. CODE ANN. § 91-1-5 (1972); Aycock v. Aycock, 81 So. 482 (Miss. 1919). In *Aycock*, the decedent's father took to the exclusion of his half blood brothers and sisters. *Id.*

[45] MUPC, *supra* note 20, § 2-107.

and their right to inherit is vested.[46]

The MUPC alters this rule by providing that a person must survive the decedent by at least 120 hours in order to be considered to have survived the decedent for purposes of inheritance.[47]

6. *After Born Heirs*

Mississippi law treats a fetus the same as any other person for inheritance purposes, provided it is subsequently born alive.[48] The MUPC concurs with this position but further requires that the newborn live for 120 hours or more after birth.[49]

7. *Nonresident Aliens*

Present Mississippi law generally does not permit nonresident aliens to inherit land located in Mississippi.[50] The MUPC abolishes alienage as a disqualification.[51]

8. *Advancements and Debts Owed Decedent by Heir*

Under Mississippi law the doctrine of advancement applies only to inter vivos gifts made by the decedent to children or descendents of the decedent, and only when the decedent dies totally intestate. In addition, no writing is required.[52]

The MUPC applies the doctrine to gifts made to any heir, regardless of whether the decedent dies totally or partially intestate. However, a contemporaneous writing by the decedent declaring the gift to be an advancement, or an acknowledgement in writing by the heir to the same effect, is required.[53]

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[46] Grantham v. Statham, 35 So. 423, 424 (Miss. 1903).

[47] MUPC, *supra* note 20, § 2-104.

[48] Harper v. Archer 12 Miss. 99, 109 (1845). An infant even born eight months later was entitled to inherit. *Id.*

[49] MUPC, *supra* note 20, § 2-108.

[50] MISS. CODE ANN. § 89-1-23 (1972).

[51] MUPC, *supra* note 20, § 2-111.

[52] MISS. CODE ANN. § 91-1-17 (1972).

[53] MUPC, *supra* note 20, § 2-109.

Under the MUPC a debt owed to the decedent by an heir who predeceases the decedent is not charged against the heir's descendents.[54] An advancement to the heir does not affect his descendents either, unless the contemporaneous writing provides otherwise.[55] Mississippi law is to the contrary in both instances.[56]

9. *Adoptions*

a. *Regular Adoptions*

Mississippi law permits an adopted child to inherit from and through the adopting parents and from the other children of the adopting parents,[57] *and* from his natural kindred,[58] though only the adoptive parents and children are given the right to inherit from him.[59] The MUPC makes the adopted child a full member of the adoptive family as far as inheritance is concerned, but the adopted child may not inherit from members of the natural family.[60]

b. *Half Adoptions*

When a child is adopted by a person who is the spouse of one of the child's natural parents, Mississippi law[61] and the MUPC[62] do not disturb the inheritance rights between the child and the natural parent who is the spouse of the adopting parent. As for the other natural parent, Mississippi law[63] and the MUPC[64] permit the child to inherit from or through the

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[54] MUPC, *supra* note 20, § 2-110.

[55] MUPC, *supra* note 20, § 2-109(c).

[56] Adams v. Yancey, 62 So. 229, 230 (Miss. 1913). The Mississippi Supreme Court determined that the grandchildren could take nothing if the decendent father's debts to his father outweighed the children's inheritance from that same person, their grandfather. *Id.*

[57] MISS. CODE ANN. § 93-17-13 (1972).

[58] Alack v. Phelps, 230 So. 2d 789, 792 (Miss. 1970).

[59] MISS. CODE ANN. § 93-17-13 (1972).

[60] MUPC, *supra* note 20, § 2-114(d).

[61] MISS. CODE ANN. § 93-17-13 (1972).

[62] MUPC, *supra* note 20, § 2-114(d)(i).

[63] MISS. CODE ANN. § 93-17-13 (1972).

[64] MUPC, *supra* note 20, § 2-114(d)(ii).

natural parent.

10. Illegitimates

Mississippi law permits an illegitimate to inherit from the illegitimate's natural father and his kindred, and they from him, when there has been an adjudication of paternity either prior to or after the father's death.[65] However, an illegitimate seeking a posthumous adjudication must file the action within one year of the death of the *intestate* or within ninety days of publication of notice to creditors of the *intestate*, whichever is less.[66]

The MUPC's provisions are similar to those stated above, but under the MUPC the action to adjudicate paternity after the death of the father must be brought within three years after the death of the *father*.[67]

11. Loss of Right to Inherit by Misconduct of Heir

a. Causing Death of Decedent

An heir who willfully causes or procures the death of the decedent cannot inherit from the decedent in Mississippi.[68] The MUPC is in accord, providing that one who "feloniously and intentionally kills the decedent forfeits all benefits . . . ."[69]

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[65] MISS. CODE ANN. § 91-1-15 (1972).

[66] *Id.*

[67] MUPC, *supra* note 20, § 2-114(b). The provisions of the MUPC would appear to restrict the rights of illegitimates to inherit from the kindred of the natural father, and the rights of those kindred to inherit from the illegitimate, much more than is the case under MISS. CODE ANN. § 91-1-15 (1992). For example, in one Mississippi case, kindred of the natural father would have been able to inherit from an illegitimate, had they been able to make the required proof, even though there had been no adjudication of paternity within three years of the father's death. *In re* Estate of Ford, 552 So. 2d 1065, 1067 (Miss. 1989).

[68] MISS. CODE ANN. § 91-1-25 (Supp. 1992).

[69] MUPC, *supra* note 20, § 2-803(b). The Code also provides that the killer will not take other benefits that would have passed to the killer at the decedent's death, such as life insurance benefits. MUPC *supra* note 20, § 2-803(c)(1).

b. Surviving Spouse

While somewhat vague, Mississippi case law is to the effect that a surviving spouse may lose the right to inherit by intestate succession from the deceased spouse by misconduct in the nature of abandonment and/or cohabitation with a third person.[70] The MUPC rejects this view and requires some "definitive legal act to bar the surviving spouse."[71]

c. Parent

Mississippi law provides that the father of an illegitimate and the father's kindred shall not inherit from the illegitimate unless the father has openly treated the child as his, and has not refused or neglected to support the child.[72] The MUPC greatly enlarges this ground of disqualification by extending it to both fathers and mothers and to all children, not just illegitimates.[73]

12. Exempt Property - Homestead - Living Allowance

Mississippi law protects a decedent's exempt property from the claims of creditors of the decedent if the decedent is survived by a spouse and/or children or grandchildren.[74] The homestead is exempt up to a value of $75,000,[75] and tangible personal property is exempt up to a value of $10,000.[76] Where there are descendents as well as a surviving spouse, the spouse is entitled to exclusive use and possession of the homestead as long as he or she remains unmarried.[77] The intestate decedent's spouse and/or children who were being supported by the decedent are entitled to a one year's living

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[70] *See, e.g.*, Tillman v. Williams, 403 So. 2d 880, 881 (Miss. 1981) (holding that cohabitation and remarriage would furnish proof of abandonment).

[71] UNIF. PROBATE CODE § 2-802 cmt. (West 10th ed. 1992).

[72] MISS. CODE ANN. § 91-1-15(3)(d)(i) (Supp. 1992).

[73] MUPC, *supra* note 20, § 2-114(e).

[74] MISS. CODE ANN. § 91-1-21 (1972).

[75] MISS. CODE ANN. § 85-3-21 (1972).

[76] MISS. CODE ANN. § 85-3-1 (1972).

[77] MISS. CODE ANN. § 91-1-23 (1972).

allowance, the amount of which is not fixed by law but is in the sound discretion of the chancellor based on the facts and circumstances of each case.[78]

Under the MUPC the surviving spouse is entitled to a homestead allowance of $15,000.[79] If there is no surviving spouse but there are dependent children, each child is entitled to an equal part of the $15,000.[80] The surviving spouse, or if there is none, the decedent's children, are entitled to $10,000 in personal property and or money.[81] In addition, the surviving spouse and/or the dependent children are entitled to a one year "family allowance", the amount of which may not exceed $18,000.[82] Under the MUPC, the surviving spouse does not have a right to the exclusive use and possession of the homestead to the exclusion of his or her co-tenants.[83]

B. Wills

1. Testamentary Capacity

Mississippi law[84] and the MUPC[85] are in accord that a will may be made by any person 18 years of age or older who is of sound mind.

2. Nuncupative Wills

A person may make an oral will in certain very limited circumstances and subject to very strict conditions in Mississippi, but only as to personal property.[86] The MUPC requires

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[78] MISS. CODE ANN. § 91-1-135 (1972); Mosely v. Harper, 32 So. 2d 192, 193 (Miss. 1947). The year's living allowance used to be available only to the widow and the dependent children. This was changed by an amendment to section 91-7-135 that gives the right to a year's allowance to the decedent's "spouse." MISS. CODE ANN. § 91-1-135 (Supp. 1992).

[79] MUPC, *supra* note 20, § 2-402.

[80] *Id.*

[81] MUPC, *supra* note 20, § 2-403.

[82] MUPC, *supra* note 20, §§ 2-404, 2-405.

[83] MUPC, *supra* note 20, § 3-911.

[84] MISS. CODE ANN. § 91-5-1 (1972).

[85] MUPC, *supra* note 20, § 2-501.

[86] MISS. CODE ANN. § 91-5-15 (1972); *see* Sadler v. State, 60 Miss. 251, 253 (1882) (disallowing nuncupative wills to pass realty).

all wills to be in writing, thereby abolishing nuncupative wills.[87]

3. *Holographic Wills*

The validity of a will is recognized under Mississippi law if it is entirely written in the handwriting of the testator and is subscribed (signed at the end) by the testator.[88] The requirement that the will be entirely written in the testator's handwriting is subject to the exception that words in the will that are "mere surplusage", i.e. do not affect the meaning of the writing, do not have to be in the testator's handwriting.[89]

Under the MUPC the validity of a will is recognized if the "material portions" of the writing are in the testator's handwriting and if it is signed by the testator.[90] There is no requirement as to where it must be signed.[91] The "material portions" requirement appears to allow more of the writing to not be in the handwriting of the testator than the "mere surplusage" rule.[92]

4. *Nonholographic (Attested) Wills*

In order for a nonholographic will to be valid under Mississippi law the testator must sign it or have someone sign it for him in his presence and at his request.[93] The will must be attested (signed) by at least two witnesses.[94] Each witness must sign the will in the conscious presence of the testator,[95] though not necessarily in the presence of each other.[96] If the testator does not sign the will in the presence of the witness-

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[87] MUPC, *supra* note 20, § 2-502(a)(1).

[88] MISS. CODE ANN. § 91-5-1 (Supp. 1992).

[89] Baker v. Brown, 36 So. 539, 541 (Miss. 1904). The Mississippi Supreme Court held here that the words "My Will" were "mere surplusage." *Id.*

[90] MUPC, *supra* note 20, § 2-502(b).

[91] *See* MUPC, *supra* note 20, § 2-502; *see also* UNIF. PROBATE CODE § 2-502(a) cmt. (1991).

[92] *Id.*

[93] MISS. CODE ANN. § 91-5-1 (Supp. 1992).

[94] *Id.*; Batchelor v. Powers, 348 So. 2d 776, 778 (Miss. 1977).

[95] *In re* Will of Jefferson, 349 So. 2d 1032, 1034 (Miss. 1977).

[96] Austin v. Patrick, 176 So. 714, 716 (Miss. 1937).

es, the testator must acknowledge to them that the signature on the writing is his and that the writing is a will.[97] This latter requirement is referred to as "publishing" the will.[98] There is some uncertainty as to whether a testator must publish the will when the testator signs the will in the presence of the witnesses, but the weight of authority seems to be that the testator must do so.[99]

Like Mississippi law, the MUPC requires the writing to be signed by the testator or by someone else in the testator's presence and at the testator's direction.[100] Also like Mississippi law, the MUPC requires that the will be signed by at least two witnesses.[101] Each witness must have seen the testator (1) sign the will, (2) acknowledge the signature as his, or (3) acknowledge the writing as his will.[102] However, the MUPC does not require that witnesses sign the will in the presence of the testator, nor does it require the witnesses to sign at the time they witness the testator's signing or acknowledgement. The requirement is only that they must sign the will within a "reasonable time" after they saw testator sign the will, acknowledge the signature, or acknowledge the writing as a will.[103] This requirement allows the witnesses to sign the will after the testator's death under some circumstances.[104]

5. *Failure to Comply with the Requirements of Due Execution*

Under Mississippi law, failure to comply with the requirements of execution means that the will is void, no matter how clear it is that the testator intended for the writing to be a

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[97] *See e.g.*, Kennard v. Evans, 65 So. 2d 285, 290 (Miss. 1953).

[98] *See* Green v. Pearson, 110 So. 862, 864 (Miss. 1927).

[99] *See, e.g., In re* Estate of Keller, 380 So. 2d 1273, 1275 (Miss. 1980) (stating document needed to be "signed, attested, and published in accordance with statutory law").

[100] MUPC, *supra* note 20, § 2-502(a)(2).

[101] MUPC, *supra* note 20, § 2-502(a)(3).

[102] *Id.*

[103] MUPC, *supra* note 20, § 2-502(a)(3).

[104] UNIF. PROBATE CODE § 2-502(a) cmt. (1991).

will.[105] This rule apparently has been followed in the belief that it serves the greater good by excluding many writings which the writer did not intend to be a will and by relieving the courts of many disputes pertaining to whether a person who is now dead intended for a defectively executed writing to be a will.

However, the MUPC takes a different view. Under its provisions a writing, holographic or nonholographic, which was not executed in compliance with its requirements is not necessarily invalid as a will. The defect or defects in execution may be disregarded and the will treated as if it had been duly executed if the proponent of the writing establishes by clear and convincing evidence that the decedent intended for the writing to be a will.[106] The result of this provision is that there are no definite requirements for the valid execution of a will. It is all a matter of the decedent's intent. Apparently, no state has adopted such a rule of law.[107]

6. Self-Proved Wills

A self-proved will is a will which contains, or has attached to it, affidavits of the attesting witnesses that state the facts necessary to establish that the will was validly executed. The primary purpose of such a will is to keep the proponent from having to present testimony of or to get an affidavit from one or more of the witnesses after the death of the testator in order to have the will admitted to probate.[108]

Mississippi law provides that proof of due execution of a will may be made by affidavit of an attesting witness when there is no contest about it.[109] A recent amendment provides that affidavits of attesting witnesses may be signed at the time the will is executed and that such affidavits may be an-

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[105] *See, e.g.*, Wilson v. Polite, 218 So. 2d 843, 849 (Miss. 1969) (applying rule to attempted holographic will that was unsigned).

[106] MUPC, *supra* note 20, § 2-503.

[107] MUPC, *supra* note 20, § 2-503; *see also* UNIF. PROBATE CODE § 2-503 cmt. (1991).

[108] *See* WILLIAM M. MCGOVERN ET AL., WILLS, TRUST AND ESTATES § 4.3 at 169 (1988).

[109] MISS. CODE ANN. § 91-7-9 (1972).

nexed to or made a part of the will.[110]

The MUPC provides that a will may be made self-proved by the execution of affidavits by the testator and the witnesses, at the time the will is executed or thereafter, in a form substantially complying with provisions set forth in MUPC § 2-504.[111]

7. *Who May Witness*

Mississippi law[112] and the MUPC[113] agree that any person who is competent to be a witness under the law of evidence may act as a witness to a will. However, Miss. Code Ann. § 91-5-9 provides that if a witness is a beneficiary in the will he loses the gift or the gift may be reduced. This statute was enacted to reduce some of the hardship brought about by the Dead Man's Statute. Since the Dead Man's Statute has been repealed,[114] it can be contended that Mississippi Code Annotated section 91-5-9 should be repealed as well, but neither the Mississippi Supreme Court nor the legislature has done so. On the other hand, the MUPC exacts no penalty from a beneficiary who is also a witness to the will.[115]

8. *Choice of Law as to Execution*

Mississippi law provides that to be valid as a conveyance of property located in Mississippi, a will must be executed in accordance with Mississippi law.[116]

The MUPC provides that a will is validly executed if it is executed in accordance with the provisions of the MUPC, *or* in accordance at the time of execution with the law of the place

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[110] MISS. CODE ANN. § 91-7-7 (Supp. 1992).

[111] For provisions dealing with the probate of self-proved wills see MUPC §§ 3-303, 3-304, and 3-406.

[112] MISS. CODE ANN. § 91-5-1 (1972); *see also* Gore v. Dace, 127 So. 901, 902 (Miss. 1930) (using rule to find husband or wife of beneficiary competent as witness to will).

[113] MUPC, *supra* note 20, § 2-505(a).

[114] MISS. R. EVID. 601 cmt. (1991).

[115] MUPC, *supra* note 20, § 2-505(b).

[116] Belt v. Adams, 87 So. 666, 668 (Miss. 1921). For a will to be probated in Mississippi, the will must be executed in accordance with Mississippi law. *Id.*

where the will was executed, *or* in accordance with the law of the place where the testator was domiciled at the time of his death or had a place of abode.[117]

9. Revocation

The law in Mississippi provides that a will or a part thereof may be revoked by: (1) a physical act destroying, cancelling, or obliterating the will, or (2) by a subsequent writing made and executed as a will.[118] The subsequent writing may be a revocation clause contained in a later will,[119] or it may be a later will which is inconsistent with the earlier will.[120]

The MUPC is in general accord with these provisions.[121] In addition, the MUPC contains provisions which deal specifically with situations where the later will is partially inconsistent with the earlier will.[122] While no Mississippi statute contains such provisions, the results reached under the MUPC should not vary significantly from those under Mississippi law.

10. Revocation by Implication - Change of Family Circumstances

According to Mississippi law, a will made when the testator had no children is revoked by operation of law if the testator is survived by a child and the child reaches the age of 21, gets married, or has a child capable of inheriting.[123] This is the only situation in which a will is revoked by reason of changed family circumstances. A testator's will is not revoked, in whole or in part, by the subsequent marriage or divorce of

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[117] MUPC, *supra* note 20, § 2-506.

[118] MISS. CODE ANN. § 91-5-3 (1972).

[119] *See, e.g.*, Crosby v. Alton Ochsner Medical Foundation, 276 So. 2d 661, 669 (Miss. 1973) (stating that express revocation of will is conclusive of testator's intent and evidence to contrary is inadmissible).

[120] Estate of Crawford v. Crawford, 82 So. 2d 823, 825 (Miss. 1955). The court added that in order to revoke a prior will by implication the later will must dispose of the testator's entire estate. *Id.*

[121] *See* MUPC, *supra* note 20, § 2-507(a).

[122] MUPC, *supra* note 20, § 2-507(b)-(d).

[123] MISS. CODE ANN. § 91-5-3 (1972).

the testator.[124]

The MUPC does not provide for revocation of a will in the above situation regarding post-will children.[125] However, it does provide that divorce or annulment of the marriage revokes any gift in a will made to the testator's former spouse or to any relative of the former spouse, unless the will, a court order, or a contract entered into before or after the marriage provides otherwise.[126]

11. Revocation by Implication - Attempted Inter Vivos Conveyance

Mississippi law has recognized a common law rule that when a testator specifically devises an item of property to a beneficiary, and then later attempts unsuccessfully to convey that property to someone else, the gift in the will is revoked.[127] The MUPC does not follow this rule.[128]

12. Effect of Homicide

In Mississippi a person who "wilfully causes or procures" the death of a person shall not inherit under that person's will.[129] The MUPC prevents a person who "feloniously and intentionally" kills the decedent from inheriting by will or from receiving benefits from life insurance, trusts, and jointly owned property, by providing that such dispositions are revoked.[130]

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[124] *See* McKnight v. McKnight, 267 So. 2d 315, 317 (Miss. 1972) (applying rule where wife contended testator's divorce and property settlement impliedly revoked his will).

[125] MUPC, *supra* note 20, § 2-302(a)(1).

[126] MUPC, *supra* note 20, § 2-804. The MUPC also revokes dispositions made under will substitutes such as revocable inter vivos trusts, life insurance and retirement plan beneficiary designations, transfer on death accounts, and other revocable dispositions to the former spouse made or established prior to the divorce. Also, joint tenancies with right of survivorship become tenancies in common. *Id.*

[127] Caine v. Barnwell, 82 So. 65, 66 (Miss. 1919).

[128] *See supra* note 20, MUPC §§ 2-508, 2-804(f).

[129] MISS. CODE ANN. § 91-5-33 (1972).

[130] MUPC, *supra* note 20, § 2-803.

13. Surviving Spouse's Right to Renounce Will - Elective Share

Mississippi law gives the surviving spouse the right to renounce the will of the deceased spouse when the will makes an "unsatisfactory" provision for the surviving spouse.[131] If no provision is made the will is renounced by operation of law.[132] Upon renunciation the surviving spouse is entitled to take, in lieu of the provision in the will (if any), his or her "legal share" of the property devised or bequeathed in the will, less his or her separate estate.[133] The surviving spouse's "legal share" is that fractional part that the surviving spouse would be entitled to inherit if the deceased spouse died intestate, but is not to exceed one-half.[134] If the deceased spouse's will does not devise or bequeath all of the property the deceased spouse owns, that part passing by intestate succession is not considered and the surviving spouse takes his or her intestate share of that property regardless of the renunciation.[135] Property which passes outside the decedent's estate altogether, such as property held in joint tenancy with right of survivorship, is likewise not considered, except that if the surviving spouse is the joint tenant it is counted as part of the separate estate.[136] If the surviving spouse's separate estate is equal to or greater than his or her legal share, the surviving spouse has no further claim on the deceased spouse's estate.[137]

Under the MUPC, the surviving spouse is given the right to take an "elective share" of the deceased spouse's estate. This is in some ways similar to Mississippi's "legal share" but

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[131] MISS. CODE ANN. § 91-5-25 (1972).

[132] MISS. CODE ANN. § 91-5-27 (1972).

[133] MISS. CODE ANN. §§ 91-5-25, 91-5-29 (1972).

[134] MISS. CODE ANN. § 91-5-25 (1972).

[135] Cain v. Barnwell, 87 So. 484 (Miss. 1921). In *Cain* the renunciating spouse took the entire part of the estate not devised by the will. *Id.* at 485.

[136] Carter v. Evans, 94 So. 2d 237, 238 (Miss. 1957). Here the court applied the rule to joint and survivorship bank accounts where the wife was a joint tenant. *Id.*

[137] MISS. CODE ANN. § 91-5-29 (1972).

differs in several significant respects.[138] Whereas the surviving spouse's share under Mississippi's system is the surviving spouse's intestate fraction (1/2, 1/3, 1/4), the MUPC allocates the surviving spouse a percentage, the size of which depends upon the length of time the spouses were married. For example, in a marriage of between one and two years, the elective share is 3%; between five and six years, 15%; between ten and eleven years, 30%. As is the case under Mississippi law, the maximum elective share is 50%, and is reached when the marriage lasted fifteen years.[139]

The major difference between the MUPC's elective share plan and Mississippi's renunciation plan is the "estate" to which the surviving spouse's percentage or fraction is applied. As stated above, under Mississippi law, the fraction is applied to the property passing under the will, which in most situations will be all of the property in which the testator owned an inheritable interest. In other words, the testator's probate estate. The surviving spouse's fractional interest is not applied to property passing "outside the estate" of the decedent, such as property held in joint tenancy with right of survivorship or life insurance proceeds. It also is not applied to any property the decedent disposed of prior to death.[140]

The MUPC applies the surviving spouse's elective share percentage to the value of an accumulated mass of property called the *augmented estate.*[141] The augmented estate is composed of (1) the value of the decedent's net probate estate,[142] which is defined as the property of the decedent that would pass by intestate succession had the decedent died intestate; (2) the value of the decedent's *reclaimable* estate,[143] which is made up of: (a) certain property over which the decedent had a power of appointment,[144] (b) property which the decedent owned in a joint tenancy with right of survivorship with some-

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[138] MUPC, *supra* note 20, art. II, pt. 2.
[139] MUPC, *supra* note 20, § 2-201.
[140] *See* MISS. CODE ANN. §§ 91-5-25, -27, -29 (1972).
[141] MUPC, *supra* note 20, § 2-202.
[142] MUPC, *supra* note 20, § 2-202(b)(1).
[143] MUPC, *supra* note 20, § 2-202(b)(2).
[144] MUPC, *supra* note 20, § 2-202(b)(2)(i).

one other than the surviving spouse, to the extent of decedent's unilaterally revocable interest therein,[145] (c) proceeds of life insurance payable to anyone other than the surviving spouse by reason of the decedent's death, provided the decedent owned the policy or had certain rights with regard to it,[146] and (d) certain property the decedent transferred during the decedent's marriage to the surviving spouse and within two years of death to any person other than a bona fide purchaser and for the benefit of any person other than the surviving spouse;[147] (3) the value of property the surviving spouse receives by reason of the decedent's death other than through homestead allowance, exempt property, family allowance, testate succession, or intestate succession, such as insurance proceeds payable on the life of the decedent,[148] and (4) the net value of the property owned by the surviving spouse at the decedent's death, including the value of the surviving spouse's reclaimable estate had the surviving spouse predeceased the decedent.[149] The value of this mass of property is multiplied by the surviving spouse's elective share percentage to produce the surviving spouse's elective share amount.[150]

As with Mississippi's renunciation system, the MUPC requires the surviving spouse's property to be deducted from the elective share amount in order to determine what the surviving spouse is actually entitled to receive from the deceased spouse's estate.[151] For this purpose, the surviving spouse's property which must be deducted includes: (a) amounts passing to the surviving spouse by testate or intestate succession,[152] (b) items includable in item (3) above,[153] and (c) items includable in item (4) above multiplied by twice the surviving spouse's elective share percentage.[154] After

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[145] MUPC, *supra* note 20, § 2-202(b)(2)(ii).
[146] MUPC, *supra* note 20, § 2-202(b)(2)(iii).
[147] MUPC, *supra* note 20, § 2-202(b)(2)(iv).
[148] MUPC, *supra* note 20, § 2-202(b)(3).
[149] MUPC, *supra* note 20, § 2-202(b)(4).
[150] MUPC, *supra* note 20, § 2-201(a).
[151] MUPC, *supra* note 20, § 2-207.
[152] MUPC, *supra* note 20, § 2-207(a)(1).
[153] MUPC, *supra* note 20, § 2-207(a)(2).
[154] MUPC, *supra* note 20, § 2-207(a)(4).

these values are deducted, the surviving spouse is entitled to receive from the decedent's probate estate and reclaimable estate the amounts required to make up any deficiency.[155] Owners of the properties subject to the payment of the deficiency contribute on a pro rata basis, except that owners of properties irrevocably transferred within two years of decedent's death are not required to contribute unless all other property is insufficient to pay the deficiency.[156] As with Mississippi law, if the surviving spouse's estate is larger than the elective share amount, the surviving spouse is owed nothing else from the deceased spouse's estate as far as inheritance rights are concerned.[157]

Further, the MUPC provides for a supplemental elective share amount of $50,000. If the surviving spouse's own assets, plus what he or she receives by will and intestate succession, plus what he or she receives by way of elective share amount do not total $50,000, then the surviving spouse is entitled to receive the difference from the decedent's estate.[158]

As the name implies, the surviving spouse must elect to receive the elective share.[159] It is only available to surviving spouses of decedents who die while domiciled in Mississippi.[160] The right to elect is personal to the surviving spouse,[161] and may be exercised only during the life of the surviving spouse.[162] The election must be made by filing a petition therefore within nine months after the date of the decedent's death or within six months after probate of decedent's will, whichever is later.[163] The right to elect may be waived by a writing signed by the surviving spouse before or after marriage,[164] but the agreement to waive must be

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[155] MUPC, *supra* note 20, § 2-207(b), (c).
[156] *Id.*
[157] MUPC, *supra* note 20, § 2-207(a).
[158] MUPC, *supra* note 20, § 2-201(b).
[159] MUPC, *supra* note 20, § 2-205.
[160] MUPC, *supra* note 20, § 2-201(a).
[161] MUPC, *supra* note 20, § 2-203.
[162] MUPC, *supra* note 20, § 2-203(a).
[163] MUPC, *supra* note 20, § 2-205.
[164] MUPC, *supra* note 20, § 2-204(a).

voluntary, informed, and not unconscionable.[165]

14. Pretermitted Children

As previously noted, Mississippi law provides that if a will is made when the testator is childless, but at death he does have a child, then the will is revoked unless the child dies before reaching the age of 21, is unmarried, and is not survived by a child capable of inheriting.[166] Mississippi law makes a different provision when the testator does have a child when he makes the will and then has other children after making the will. In such a situation, the post-will child receives an intestate share unless it was the testator's intent to disinherit the child.[167] Extrinsic evidence is admissible to determine the testator's intent.[168]

If the testator made a will prior to having children, but at death he does have a child, the MUPC provides that the child is entitled to his or her intestate share unless the testator devised all or substantially all of the estate to the child's other parent who survived the testator.[169] If the testator had a child at the time he made the will, and later has another child, then the post-will child is entitled to share in the devises, if any, that were made to the pre-will child.[170] This right will be defeated if the will discloses a contrary intent.[171]

15. Omitted Spouses

No special provision is made under Mississippi law for a spouse who marries a person after that person has made a will which does not make any provision for a surviving spouse. Such a will would be renounced by operation of law and the surviving spouse would take his or her legal share less his or

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[165] MUPC, *supra* note 20, § 2-204(b).

[166] MISS. CODE ANN. § 91-5-3 (1972).

[167] MISS. CODE ANN. § 91-5-5 (1972).

[168] *See* Guion v. Guion, 100 So. 2d 351, 353 (Miss. 1958) (applying rule to allow extrinsic evidence showing testator intended to disinherit her children).

[169] MUPC, *supra* note 20, § 2-302(a)(1).

[170] MUPC, *supra* note 20, § 2-302(a)(2).

[171] MUPC, *supra* note 20, § 2-302(b)(1).

her separate estate.[172]

However, the MUPC provides that one who marries a person after that person has made a will is entitled to an intestate share of the part of the estate that was not devised to children of the testator who were born before the surviving spouse married the testator.[173] This right of the post-will surviving spouse will be defeated if: (1) the will was made in contemplation of the marriage,[174] (2) the will expressed the intent that it be effective notwithstanding a subsequent marriage,[175] or (3) the testator made provisions for the surviving spouse outside the will with the intent that it be in lieu of a testamentary provision.[176]

16. Penalty Clause for Contest

Some wills contain a provision that if any beneficiary in the will contests the will the gift to the contestant shall be revoked. If such a beneficiary does contest the will, and wins, the revocation provision falls with the will and has no force or effect.

But if the contest of the will fails, does the beneficiary lose his or her gift? Some jurisdictions hold that the gift is lost, while others hold that the gift is not lost if the contestant beneficiary had probable cause to contest the will.[177] The MUPC adopts the latter view.[178] Mississippi has no statute on this point, and no Mississippi case addressing it has been found.

17. Revival of a Revoked Will

Mississippi law provides that when will A has been revoked by will B, the subsequent revocation of will B will not revive will A.[179]

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[172] *See* McKnight v. McKnight, 267 So. 2d 315 (Miss. 1972).
[173] MUPC, *supra* note 20, § 2-301(a).
[174] MUPC, *supra* note 20, § 2-301(a)(1).
[175] MUPC, *supra* note 20, § 2-301(a)(2).
[176] MUPC, *supra* note 20, § 2-301(a)(3).
[177] McGovern,, *supra* note 108, § 14.1, at 586.
[178] MUPC, *supra* note 20, §§ 2-517, 3-905.
[179] *See* Bohanan v. Walcot, 2 Miss. 336, 339 (1835) (holding that once revoked,

The MUPC provides that where will B is revoked by a physical act, will A is revived if it is evident from the circumstances of the revocation of will B or from the testator's contemporary or subsequent declaration that the testator intended for will A to be revived.[180] If will B is revoked by will C, then will A will be revived only if it appears from the terms of will C that the testator so intended.[181]

18. Anti-lapse

Under Mississippi law, a gift in a will lapses when the beneficiary predeceases the testator, unless the beneficiary is a child or descendent of the testator who is himself or herself survived by a child or descendent.[182] In this case the gift goes to the child or descendent of the deceased beneficiary.[183]

The MUPC greatly expands the category of those beneficiaries whose gifts do not lapse but rather go to their descendents. The expanded category includes grandparents, descendents of grandparents, and step-children.[184]

Further, under Mississippi law, both specific and general gifts which lapse become part of the residuary if the gift is of personalty, and probably do so if the gift is of realty.[185] Where one of several residuary beneficiaries predeceases the testator, the decedent's part of the residuary goes to the testator's heirs at law and not to the other residuary beneficiaries.[186]

The MUPC is in accord with Mississippi law in that lapsed specific and general gifts go into the residuary.[187]

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will had no present or potential existence).

[180] MUPC, *supra* note 20, § 2-509(a).

[181] MUPC, *supra* note 20, § 2-509(c).

[182] MISS. CODE ANN. § 91-5-7 (1972).

[183] *Id.*

[184] MUPC, *supra* note 20, § 2-603(b).

[185] *See* Oliphant v. Skelton, 93 So. 2d 181, 182 (1957) (stating that residuary carries everything testator tried but failed to dispose of); *In re* Will of Palmer, 359 So. 2d 752, 754 (Miss. 1978) (holding that lapsed gifts pass to heirs at law if will contains no residuary clause).

[186] Clark v. Case, 42 So. 2d 109, 110 (Miss. 1949).

[187] MUPC, *supra* note 20, § 2-604(a).

However, lapsed parts of the residuary itself go to the other residuary beneficiaries.[188]

19. Class Gifts

At common law, and probably under Mississippi law, membership in a class to which a gift was made was ascertained at the moment of the testator's death if the gift was outright.[189] Those persons who had been members of the class but who predeceased the testator were disregarded in determining the number of shares into which the gift was to be divided, unless the jurisdiction applied its anti-lapse statute to class gifts and the decedent was within the category of devisees protected by the anti-lapse statute.[190]

The MUPC departs from the common law rule by providing that a person who would have been a member of the class had he or she not predeceased the testator shall be allocated a share if he or she was survived by descendents, and this share shall be taken by his or her descendents by representation.[191] This rule applies regardless of whether or not the deceased class member was within the anti-lapse statute.[192]

20. Ademption of Specific Devises

Mississippi follows the common law in holding that if a specific item of property is given to a beneficiary in a will and the testator does not own that item of property at the time of his death, then the gift has been adeemed, i.e. withdrawn.[193]

The MUPC is much more liberal in this regard concerning the specific beneficiary.[194] For example, it gives the beneficiary any property acquired by the testator as a replacement for the specifically devised item of real or personal

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[188] MUPC, *supra* note 20, § 2-604(b).

[189] *See* Branton v. Buckley, 54 So. 850 (Miss. 1911) (applying rule and stating that beneficiaries ascertained at time of distribution).

[190] THOMAS E. ATKINSON, LAW OF WILLS § 140 (2d ed. 1953).

[191] MUPC, *supra* note 20, § 2-603(b)(2).

[192] *Id.*

[193] Welch v. Welch, 113 So. 197, 198 (Miss. 1927).

[194] *See* MUPC, *supra* note 20, § 2-606.

property.[195] Furthermore, if no replacement was acquired, the MUPC gives the beneficiary the value of the item specifically devised unless the facts and circumstances indicate that the testator intended that the specific gift be adeemed.[196]

21. Ademption by Satisfaction

Mississippi follows the common law rule that a testator may satisfy a gift in a will by making an inter vivos transfer of money or other property to the beneficiary in the will.[197]

The MUPC recognizes this doctrine only if: (1) the will provides for the deduction of the gift, (2) there is a contemporaneous writing in which the testator declared that the inter vivos gift was to be in partial or full satisfaction of the gift, or (3) there is a writing in which the beneficiary acknowledged the same.[198]

22. Exoneration

The rule in Mississippi is that a specific gift of land that is encumbered by debt should be exonerated; the lien should be paid out of the other assets of the estate unless the testator manifested a contrary intent in the will.[199] The rule as to gifts of personalty is not as clear, but is probably the same if the lien can be paid out of personalty not specifically bequeathed.[200]

The MUPC overturns this rule and provides that specific gifts of property shall not be exonerated.[201]

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[195] MUPC, *supra* note 20, § 2-606(5).

[196] MUPC, *supra* note 20, § 2-606(6).

[197] *See* Lake v. Harrington, 48 So. 2d 845, 848 (Miss. 1950) (stating that payments may constitute ademption under some circumstances).

[198] MUPC, *supra* note 20, § 2-609(a).

[199] Kent v. McCaslin, 117 So. 2d 804, 806 (Miss. 1960). The court pointed out that its ruling followed the general rule outside Mississippi. *Id.* at 806-07.

[200] *See* ATKINSON, *supra* note 190, § 137.

[201] MUPC, *supra* note 20, § 2-607.

C. Administration of Intestate Estate

1. Mississippi Law

Under Mississippi law, the administration of the estate of an intestate decedent usually begins when an heir at law files a petition in the chancery court of the appropriate county asking that letters of administration issue to the petitioner.[202] While some of the statutes lead one to believe that the law requires the administration of all intestate estates,[203] there will actually be no administration if no one initiates it. Mississippi has no statute of limitations setting a time after which an estate may not be administered, and the petitioner is not required to give any notice of the filing.

Letters of administration may be issued on the order of the chancellor, or the chancery clerk.[204] The action of the clerk is subject to the approval of the chancellor, but is valid until disapproved.[205] Before letters are issued to a person, that person must take a prescribed oath and give a bond in the total amount of the intestate's personal estate.[206] However, under some circumstances the bond may be waived or the amount reduced.[207]

After appointment, the administrator is required to make an inventory and appraisement of the decedent's personal property if one is not made by appointed appraisers.[208] However, some chancellors believe that they have the authority to waive inventory and appraisement, and sometimes they do so.[209] If the decedent left a surviving spouse and/or children,

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[202] MISS. CODE ANN. § 91-7-63 (1972).

[203] *See* MISS. CODE ANN. §§ 91-7-79, 91-7-83 1972).

[204] MISS. CODE ANN. §§ 91-5-141, 91-7-63 (1972).

[205] MISS. CODE ANN. § 91-7-151 (Supp. 1992); *see* Bigleben v. Henry, 17 So. 2d 602, 604 (Miss. 1944).

[206] MISS. CODE ANN. § 91-7-67 (Supp. 1992).

[207] *Id.*

[208] MISS. CODE ANN. § 91-7-93 (1972).

[209] MISS. CODE ANN. § 91-7-109 deals with the appointment of three disinterested persons to inventory and appraise the personal property of the decedent. It provides that the court or clerk may for good cause order the inventory and appraisement dispensed with. MISS. CODE ANN. § 91-7-93 provides that the adminis-

they are entitled to the decedent's exempt property.[210] In addition, the decedent's spouse and/or dependent children, if any, are entitled to a living allowance for one year.[211] The personal representative is required to: (1) give notice by publication and otherwise to creditors of the decedent of the requirement that they probate their claims,[212] (2) pay claims that have been timely and properly probated[213] and that are due,[214] out of the personal property of the estate, and if this is insufficient, out of the real property,[215] and (3) proceed to collect assets and otherwise administer the estate.

The administration of the intestate estate in Mississippi is done under the chancellor's supervision and authority. With regard to most actions, the administrator must get the prior approval of the chancellor.[216]

If it is necessary for the administration to last longer than a year, the administrator is required to make an annual accounting at the end of each year of the administration.[217]

When the estate has been fully administered and the administrator is ready to close the estate, a petition must be filed so stating and containing a final accounting.[218] The heirs at law of the decedent are given notice of the filing and of the hearing on the final account.[219] If the chancellor finds all to be in order, the final account will be approved.[220] The

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trator shall make an inventory of the decedent's money and the debts owed to the decedent, and further provides that where "appraisement is dispensed with or not made," the administrator shall "embrace in said inventory and give its value all property which has come into his hands." It is submitted that the effect of these provisions is to require the administrator to make an inventory and appraisement of the decedent's personalty if the three disinterested appraisers do not. However, it can be contended that § 91-7-109 authorizes the court or clerk to dispense with all inventory and appraisement.

[210] MISS. CODE ANN. § 91-7-117 (1972).

[211] MISS. CODE ANN. § 91-7-135 (Supp. 1992).

[212] MISS. CODE ANN. § 91-7-145 (Supp. 1992).

[213] MISS. CODE ANN. § 91-7-55 (1972).

[214] *Id.*

[215] MISS. CODE ANN. § 91-7-91 (Supp. 1992).

[216] *See, e.g.*, MISS. CODE ANN. §§ 91-7-169, 91-7-173, 91-7-227, 91-7-229 (1972).

[217] MISS. CODE ANN. § 91-7-277 (1972).

[218] MISS. CODE ANN. § 91-7-291 (1972).

[219] MISS. CODE ANN. § 91-7-295 (1972).

[220] MISS. CODE ANN. § 91-7-297 (1972).

court will set the fee that the administrator will be entitled to pay his attorney out of the assets of the estate,[221] and the commission the administrator is entitled to pay himself.[222] The administrator will pay these fees and make distribution of the estate to the heirs at law. The usual administration procedure does not include an adjudication of heirship, but such an adjudication will be made by the court if an interested party institutes such a proceeding.[223] Interested parties have two years in which to challenge the final account.[224]

2. *MUPC - Unsupervised Administration*[225]

a. *Appointment of Personal Representative*

Under the MUPC, administration of the intestate estate is begun by the filing of an application requesting the appointment of a personal representative for the decedent.[226] The MUPC contains an order of priority for appointment as personal representative which is very similar to Mississippi law.[227] Generally, the petition for appointment must be filed within three years of the decedent's death.[228] The petitioner may seek an informal appointment[229] by the registrar,[230]

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[221] MISS. CODE ANN. § 91-7-281 (1972).

[222] MISS. CODE ANN. § 91-7-299 (Supp. 1992).

[223] *See, e.g.*, Shepherd v. Townsend, 162 So. 2d 878, 881 (Miss. 1964). However, the court's decree on the final account customarily includes a directive that the administrator distribute the net estate to those heirs at law who were identified in the petition for final account and who were given legal notice of the proceeding. While not an adjudication of heirship, this decree would seem to be binding on those who were given legal notice.

[224] MISS. CODE ANN. § 91-7-309 (1972).

[225] The MUPC also provides for an administration of an estate under the supervision of the court, but the intent and expectation of the code is that the vast majority of administrations will be unsupervised. *See infra* section III.F for a discussion of supervised administration under the MUPC.

[226] MUPC, *supra* note 20, § 3-103; *see also* MUPC, *supra* note 20, §§ 3-301, 3-402.

[227] MUPC, *supra* note 20, § 3-203(a).

[228] MUPC, *supra* note 20, § 3-108.

[229] MUPC, *supra* note 20, § 3-301(a).

[230] *Id.* The registrar is defined as the chancellor or a person, including the chancery clerk, designated by the chancellor. MUPC, *supra* note 20, §§ 1-201(42), 1-307.

or he may seek a formal appointment by the chancellor.[231]

If the petitioner elects to seek an informal appointment the procedure is much like the Mississippi procedure discussed above. However, notice must be given to those people, if any, who have a prior or equal right to appointment or who have formally filed a request for notification.[232] If the decedent was a resident of Mississippi, if the application is in order, and if 120 hours have elapsed since decedent's death, the applicant may be appointed as personal representative of the estate by the registrar.[233] If the decedent was a nonresident, the appointment must be delayed until thirty days have elapsed since the decedent's death, unless the applicant is the personal representative appointed at the decedent's domicile.[234]

The applicant may seek a formal appointment as personal representative.[235] This course might be desired when there is a dispute among the heirs as to who should be appointed, and a binding adjudication is desired to settle the controversy.[236] A formal appointment proceeding might also be desired where the applicant wants to obtain an adjudication that the decedent died intestate.[237] The MUPC authorizes the court to make such an adjudication, and provides that when this occurs, the court shall also make an adjudication as to who are the heirs at law of the decedent.[238]

b. Appointment, Bond, Notice to Heirs, Inventory

Whether the personal representative is appointed formally or informally, letters will issue upon the filing of a statement of acceptance by the personal representative and a bond, if required.[239] A bond is generally not required, but the court

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[231] MUPC, *supra* note 20, § 3-402.
[232] MUPC, *supra* note 20, § 3-310.
[233] MUPC, *supra* note 20, § 3-307.
[234] *Id.*
[235] MUPC, *supra* note 20, § 3-402.
[236] *See* MUPC, *supra* note 20, § 3-414.
[237] MUPC, *supra* note 20, § 3-401.
[238] MUPC, *supra* note 20, § 3-402(b).
[239] MUPC, *supra* note 20, § 3-601.

may order one in certain situations.[240] The personal representative is required to give notice of his appointment within thirty days to the heirs of the decedent.[241] This notice must inform the recipient of the name and address of the personal representative, whether bond has been filed, and the court where estate papers are on file. The notice also must explain that the estate is being administered without supervision of the court but that the recipient is entitled to information regarding the administration from the personal representative and that the recipient can petition the court in any matter relating to the estate.[242]

Within three months after appointment, the personal representative must prepare an inventory of the real and personal property owned by the decedent, indicating thereon the value of each item and any encumbrances that may exist.[243] He must send a copy of the inventory to any interested person who requests it, and may also file the original inventory with the court.[244] A supplementary inventory is required if the personal representative discovers that the original is erroneous or misleading, or if new property of the decedent is found.[245]

c. Notice to Creditors, Presentation and Payment of Claims

The MUPC provides that the personal representative *may* publish a notice to claimants in a newspaper once a week for three consecutive weeks,[246] and *may* deliver a notice to a claimant by mail or otherwise.[247] There is no requirement that he do either.[248]

If notice is published, the claimant is required to present

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[240] MUPC, *supra* note 20, § 3-603.
[241] MUPC, *supra* note 20, § 3-705.
[242] *Id.*
[243] MUPC, *supra* note 20, § 3-706.
[244] *Id.*
[245] MUPC, *supra* note 20, § 3-708.
[246] MUPC, *supra* note 20, § 3-801(a).
[247] MUPC, *supra* note 20, § 3-801(b).
[248] MUPC, *supra* note 20, § 3-801; *see also* UNIF. PROBATE CODE (U.L.A.) § 3-801 cmt. (West 10th ed. Supp. 1992).

his claim within ninety days.[249] If notice is delivered to the claimant, he has sixty days within which to present his claim.[250] If both are done, the claimant has the later time in which to act.[251] The requirement of presentation applies to *all* claims, whether based on tort or contract, liquidated or unliquidated.[252]

The claimant is required to prepare a written statement of the claim, setting forth such matters as the name and address of the claimant, the basis of the claim, and its amount.[253] If the claim is contingent or unliquidated, the nature of the uncertainty shall be stated.[254] The claimant may deliver the written statement to the personal representative, or he may file it with the clerk of the court.[255] Alternatively, the claimant may commence a proceeding against the personal representative in any court where the personal representative is subject to jurisdiction.[256] Whichever the claimant does, he must do it within the ninety/sixty day period following publication or delivery of notice.[257] If the personal representative elects not to give any notice to claimants, a claimant must act to preserve his claim within one year of the decedent's death or the action will be barred.[258]

Upon timely presentation of the claim, the personal representative may allow or disallow it in whole or in part.[259] Notice of disallowance may be mailed to the claimant.[260] Failure by the personal representative to give the claimant notice of disallowance for sixty days after the time for original presentation has expired has the effect of a notice of allow-

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[249] MUPC, *supra* note 20, § 3-801.
[250] MUPC, *supra* note 20, § 3-801(b).
[251] *Id.*
[252] MUPC, *supra* note 20, § 3-803(a).
[253] MUPC, *supra* note 20, § 3-804(1).
[254] *Id.*
[255] *Id.*
[256] MUPC, *supra* note 20, § 3-804(2).
[257] MUPC, *supra* note 20, §§ 3-803(a)(2), 3-804(2).
[258] MUPC, *supra* note 20, § 3-803(a)(1).
[259] MUPC, *supra* note 20, § 3-806(a).
[260] *Id.*

ance.[261]

When the claimant receives a notice of disallowance, and if the notice warns him of the impending bar, the claimant has sixty days in which to contest the disallowance.[262] He may institute the contest by: (1) filing a petition for allowance with the court, or (2) commencing a proceeding against the personal representative in an appropriate court.[263] The personal representative may change his mind about allowing or disallowing the claim, subject to some limitations.[264] If the disallowance is not resolved by the claimant and the personal representative, the court will decide the matter.[265]

The MUPC provides that when the time limitation on the presentation of claims has expired, the personal representative shall proceed to pay all claims that have been allowed by the court or by the personal representative himself.[266] Funds sufficient to pay such preferred items as homestead and family allowances are set aside, as are funds that will be needed to pay expenses of administration, and the rest will be used to pay the allowed claims in order of priority.[267] However, the personal representative does not have to wait until the time limitation has expired, for he is expressly authorized to pay at any time any just claim that has not been barred, with or without any formal presentation.[268] This is of course a total departure from the rule in Mississippi that a personal representative can only pay claims which have been "probated, allowed and registered."[269]

One of the fundamental principles of Mississippi estate law is that claims against the intestate decedent's estate are to be paid out of the personal property, and that the estate

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[261] *Id.*

[262] *Id.*

[263] *Id.*

[264] MUPC, *supra* note 20, § 3-806(a), (b).

[265] MUPC, *supra* note 20, § 3-806(c).

[266] *See* MUPC, *supra* note 20, § 3-807(a).

[267] MUPC, *supra* note 20, § 3-807(a).

[268] MUPC, *supra* note 20, § 3-807(b). In so doing, the personal representative may become personally liable to any claimant who is injured by the payment, but will not incur any liability to an heir or devisee. *Id.*

[269] MISS. CODE ANN. § 91-7-155 (1972).

realty is to be used only when the personalty is insufficient to discharge the claims and expenses.[270] The MUPC totally departs from this principle, providing that there shall be no preference or priority as between real and personal property.[271]

Mississippi law provides that the chancellor may authorize the administrator to compromise a claim of the estate.[272] Under the MUPC the personal representative may compromise claims of or against the estate without the necessity of court authority.[273]

d. Administration of the Estate

The most significant difference between the administration of the intestate estate under Mississippi law and an unsupervised administration under the MUPC concerns the general powers of the personal representative to deal with the property of the estate and to perform various acts relating thereto. As noted above, under Mississippi law the administrator must obtain the approval and authority of the chancellor before he can perform most acts. Under the MUPC the personal representative is directed to proceed expeditiously with the settlement and distribution of the estate and, unless otherwise ordered, to do so without order or direction of the court.[274] The position of the personal representative appears to be very similar to that of an executor of a testate estate under Mississippi law where the will waives accountings and confers upon the executor the powers enumerated under the Uniform Trustees Powers Act.[275] While not required to do so, the personal representative may invoke the jurisdiction of the court to resolve questions concerning the estate or its administration.[276] Other interested parties may do so as well.[277]

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[270] *See* MISS. CODE ANN. §§ 91-7-91 (Supp. 1992), 91-7-191 (1972).
[271] MUPC, *supra* note 20, § 3-902(a).
[272] MISS. CODE ANN. § 91-7-229 (1972).
[273] MUPC, *supra* note 20, §§ 3-715(17), (27), 3-813.
[274] MUPC, *supra* note 20, § 3-704.
[275] *See* MISS. CODE ANN. § 91-9-107 (Supp. 1992).
[276] *Id.*
[277] MUPC, *supra* note 20, § 3-705.

But unless and until the court's intervention and direction is sought, the personal representative is empowered to administer the estate as he wishes,[278] with the exception that he is under a duty to avoid self-dealing.[279]

The personal representative must use his power and authority for the best interests of the successors of the estate.[280] He is basically a trustee, and as such is under a duty to observe the standards in dealing with the estate assets that would be observed by a prudent man dealing with the property of another.[281] If he breaches his fiduciary duty he is liable to interested persons for losses occasioned thereby to the same extent as a trustee of an express trust.[282] The duty and liability of a personal representative under Mississippi law is essentially the same.[283]

e. Personal Representative's Compensation and Attorney's Fee

As noted above, Mississippi law directs the court to allow the personal representative such an amount that the court deems proper as compensation to the personal representative for his services in administering the estate.[284] The court is also directed to allow the personal representative a fee for his attorney in an amount the court determines to be reasonable.[285] The personal representative is then authorized to pay these sums out of the assets of the estate.

The MUPC, consistent with its policy of permitting the personal representative to administer the estate without seeking court authority, permits the personal representative to fix

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[278] *See, e.g.*, MUPC, *supra* note 20, §§ 3-709, 3-711.

[279] MUPC, *supra* note 20, § 3-713; *see also* UNIF. PROBATE CODE (U.L.A.) § 3-713 cmt. (West 10th ed. 1991).

[280] MUPC, *supra* note 20, § 3-703(a).

[281] MUPC, *supra* note 20, § 3-703(a), 7-302.

[282] MUPC, *supra* note 20, § 3-712.

[283] *See, e.g.*, Harper v. Harper, 491 So. 2d 189, 194 (Miss. 1986) (holding that standard of care and fiduciary duty applicable to general trustee applies to executor or administrator).

[284] *See supra* note 222 and accompanying text.

[285] *See supra* note 221 and accompanying text.

his and his attorney's fees without obtaining the approval of the court.[286] He may also fix the fee of other people he hires to help with the administration of the estate.[287] However, upon petition and after notice to all other interested persons, any interested person may have the court determine (1) the propriety of the hiring of the person, (2) the reasonableness of the compensation to the person determined by the personal representative, and/or (3) the reasonableness of the compensation the personal representative paid to himself.[288] If the court finds the compensation paid to be excessive, the recipient may be ordered to make a refund.[289]

f. Closing the Estate

The MUPC provides for two methods of closing the administration of an estate: an informal method which is accomplished with a sworn statement of the personal representative,[290] and a formal proceeding which involves notice and a hearing before the court and which culminates in a court order discharging the personal representation.[291]

1. *Closing by Sworn Statement.* Under this informal closing procedure the personal representative, provided at least four months have elapsed since his appointment, may file with the court a verified statement asserting that: (1) time for presentation of claims has expired, (2) the estate has been fully administered by the satisfaction of all claims presented, the payment of all taxes and administration expenses, and the distribution of the remaining assets to the persons entitled thereto, and (3) a copy of the statement and a full written account of the administration has been sent to all distributees of the estate.[292] The rights of successors and creditors to take action against the personal representative for an alleged

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[286] MUPC, *supra* note 20, § 3-715(18), 3-721; *see* UNIF. PROBATE CODE (U.L.A.) § 3-721 cmt. (West 10th ed. 1991).

[287] MUPC, *supra* note 20, § 3-715(18), (21).

[288] MUPC, *supra* note 20, § 3-721.

[289] *Id.*

[290] MUPC, *supra* note 20, § 3-1003(a).

[291] MUPC, *supra* note 20, §§ 3-1001, 3-1002.

[292] MUPC, *supra* note 20, § 3-1003(a).

breach of fiduciary duty are barred six months after the statement is filed, except for matters involving fraud, misrepresentation, or inadequate disclosure.[293] The appointment of the personal representative is terminated one year after filing if no proceedings against him are pending.[294]

2. *Formal Closing.* The personal representative may petition the court for an order of complete settlement of the estate.[295] Any other interested person may also so petition, but only after one year has elapsed from the time the personal representative was appointed.[296] The petition may request the court to consider and determine, among other things, matters concerning: (1) the final accounting, after, if necessary, compelling the personal representative to make one, (2) the determination of heirs, and (3) the distribution of the estate.[297] After notice to all interested parties and a hearing, the court may enter an order determining the matters presented and discharging the personal representative from further claim or demand of any interested person.[298]

This formal procedure is similar to the closing procedure required for intestate estates by Mississippi law. However, in the Mississippi procedure the court order is not conclusive as to the personal representative's final account until two years have elapsed.[299] Under the MUPC the court order is final as to those interested persons who received notice, subject to the right of appeal.[300]

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[293] MUPC, *supra* note 20, § 3-1005.
[294] MUPC, *supra* note 20, § 3-1003(b).
[295] MUPC, *supra* note 20, § 3-1001(a).
[296] *Id.*
[297] *Id.*
[298] *Id.*
[299] *See* MISS. CODE ANN. § 91-7-309 (1972).
[300] MUPC, *supra* note 20, §§ 3-1001, 3-1002; *see also* UNIF. PROBATE CODE § 1002 cmt. (1991).

D. Probate and Contest of Decedent's Will

1. Statute of Limitations.

Under the MUPC a will may not be probated until at least 120 hours have elapsed since the decedent's death.[301] Likewise, a will generally may not be probated if more than three years have elapsed since the decedent's death.[302] Mississippi law has neither a provision as to how soon after death a will may be probated nor a statute of limitation as to how long after death a will may be probated.[303]

2. Informal/Common Form Probate

Both Mississippi law[304] and the MUPC[305] follow the common law practice of permitting a will to be probated in an informal summary manner. The procedures are very similar. Both are begun by the filing of a petition with the original will, if available, attached. Mississippi law requires no notice to anyone. The MUPC requires the petitioner to give notice to those who request it and to a personal representative already appointed, but no hearing is required.[306]

Under Mississippi law the proponent is required to present proof that the testator had testamentary capacity and that the will was duly executed.[307] If the will is not holographic, the proof must be made by at least one of the attesting witnesses, if possible.[308] The necessary testimony may be presented in the form of affidavits if no contest exists at that

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[301] MUPC, *supra* note 20, § 3-302.

[302] MUPC, *supra* note 20, § 3-108.

[303] Harrison v. Gatewood, 51 So. 2d 59, 62 (Miss. 1951). In *Harrison*, the will was presented to the court for probate thirteen years after the death of the testator. *Id.* at 60. The court determined that there was no presumption of invalidity because of the thirteen year delay in presenting the will for probate. *Id.* at 62.

[304] *See* MISS. CODE ANN. § 91-7-23 (1972).

[305] MUPC, *supra* note 20, § 3-301.

[306] MUPC, *supra* note 20, § 3-306.

[307] *See* Moore v. Parks, 84 So. 230, 233 (Miss. 1920).

[308] MISS. CODE ANN. § 91-7-7 (Supp. 1992).

time.[309] Under the MUPC the petitioner is required to submit only the verified petition and the will, provided that the registrar finds that the will has the required signatures and an attestation clause which shows that the code provisions governing due execution have been met.[310] If there is no attestation clause to the will, the registrar may: (1) assume due execution if the will appears to have been properly executed, or (2) accept an affidavit of any person having knowledge of the circumstances of execution.[311] Notwithstanding the above, the registrar may decline to accept the application for informal probate if he is not satisfied that the will should be informally probated.[312]

Under Mississippi Law a will probated in common form may be contested within two years.[313] Under the MUPC an informally probated will may be contested within the later of: (1) twelve months from the informal probate, or (2) three years from the decedent's death.[314] Under both the MUPC and Mississippi law, an informally probated will is conclusive as to all persons until superseded by a court order.[315]

As will be explored more fully in the next section, under the MUPC the appointment of a personal representative to administer the testate estate does not have to follow the probate of a will.[316] The MUPC views the probate of a will and the administration of an estate as separate matters. If appointment of a personal representative does not follow the probate of the will, the proponent of the probated will must give written notice within thirty days after probate to heirs and devisees that the will has been probated.[317]

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[309] MISS. CODE ANN. § 91-7-9 (1972).
[310] MUPC, *supra* note 20, § 3-303(c).
[311] *Id.*
[312] MUPC, *supra* note 20, § 3-305.
[313] MISS. CODE ANN. § 91-7-23 (1972).
[314] MUPC, *supra* note 20, § 3-108.
[315] MUPC, *supra* note 20, § 3-302.
[316] MUPC, *supra* note 20, § 3-401; *see also* UNIF. PROBATE CODE art. III, gen. cmt. (5) (West 10th ed. 1991).
[317] MUPC, *supra* note 20, § 3-306(b).

3. *Formal Solemn Form Probate: Will Contests*

a. *Mississippi Law*

Mississippi law provides for a procedure whereby a will may be probated in a formal judicial proceeding wherein all interested persons are made parties.[318] This procedure is referred to as solemn form probate. The probate of a will in solemn form is binding on everyone who was a party to the proceeding.[319] A solemn form probate may or may not bring on a will contest. If no party desires to contest the will, the proponent may make the necessary proof as if the probate were in common form.[320]

Will contests in Mississippi may arise in one of three ways. First, and most common, an interested person may decide within two years to contest a will that has been probated in common form.[321] Second, a party to a solemn form probate may decide to contest the will.[322] Third, an interested person may file a caveat against the probate of a will before the will has been probated in common form.[323] However it arises, the sole issue in a will contest is *devisavit vel non*, which means will or no will.[324] All interested persons must be made parties.[325] Either side may choose to have a jury trial.[326] The burden of proof is upon the proponent of the will.[327]

b. *MUPC*

The MUPC likewise provides for a solemn form type probate procedure and a will contest procedure for interested

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[318] MISS. CODE ANN. § 91-7-19 (1972).
[319] *Id.*
[320] MISS. CODE ANN. § 91-7-9 (1972).
[321] MISS. CODE ANN. § 91-7-23 (1972).
[322] MISS. CODE ANN. § 91-7-19 (1972).
[323] MISS. CODE ANN. § 91-7-21 (1972).
[324] MISS. CODE ANN. § 91-7-29 (1972).
[325] MISS. CODE ANN. § 91-7-25 (1972).
[326] MISS. CODE ANN. § 91-7-19 (1972).
[327] MISS. CODE ANN. § 91-7-29 (1972).

persons who desire to contest a will.[328] These procedures are provided in what the MUPC calls a "formal testacy proceeding", which it defines as "litigation to determine whether a decedent left a valid will."[329] This litigation may be instituted for any of the following purposes: (1) to obtain solemn form probate of a will before any other probate proceeding of any kind had been instituted; (2) to obtain solemn form probate of a will which had already been probated informally, i.e. in common form; (3) to contest a will which had already been probated informally; (4) to block a pending informal probate proceeding or to prevent an informal proceeding from occurring thereafter; and/or (5) to secure a declaratory judgment that the decedent died intestate and a determination of heirship.[330] In general, the objective of the formal testacy proceeding is to obtain in one judicial proceeding a binding adjudication as to the state of the decedent's testacy; that is, whether he left a valid will or died partially or totally intestate.[331] The court is required to determine the decedent's heirs whether the petition is for the probate of a will[332] or for an adjudication of intestacy.[333]

A formal testacy proceeding commences by the filing of a petition, the contents of which are specified.[334] Upon filing of the petition the court will fix a time and place of hearing, and notice will be given to those persons designated.[335] If any party opposes the probate of a will, he must state his objections in his pleadings.[336] If the petition is uncontested the court may order probate or intestacy on the pleadings, or in the alternative, the court can conduct a hearing in open court.[337]

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[328] MUPC, *supra* note 20, art. III, pt. 4.
[329] MUPC, *supra* note 20, § 3-401.
[330] UNIF. PROBATE CODE § 3-401 cmt. (West 10th ed. 1991).
[331] MUPC, *supra* note 20, § 3-401.
[332] MUPC, *supra* note 20, § 3-402(a)(1).
[333] MUPC, *supra* note 20, § 3-402(b).
[334] MUPC, *supra* note 20, § 3-402.
[335] MUPC, *supra* note 20, § 3-403(a).
[336] MUPC, *supra* note 20, § 3-404.
[337] MUPC, *supra* note 20, § 3-405.

If a will contest develops, the proponents have the burden of establishing prima facie proof of due execution.[338] Contestants have the burden of establishing lack of testamentary capacity, undue influence, fraud, duress, mistake or revocation, and also have the burden of persuasion.[339] A party is entitled to a trial by jury in any formal testacy proceeding.[340]

Subject to the right of appeal, an order entered in a formal testacy proceeding is final as to all persons with respect to the question of whether the decedent left a valid will, and to the determination of heirs. However, this is subject to the following exceptions: (1) an order probating a will may be vacated if a new will is presented and the proponents of it were unaware of its existence or were unaware of the earlier proceeding, and (2) if intestacy was ordered the determination of heirs may be reconsidered if someone was omitted from the determination and that person was unaware of his relationship to the decedent, or of the death of the decedent, and was given no notice of the proceedings except by publication.[341]

A petition to vacate the formal testacy order must be filed prior to: (1) the entry of an order approving final distribution of the estate, or if the estate is closed by statement, six months after the filing of the statement; (2) three years after the decedent's death; or (3) twelve months after the entry of the formal testacy order, whichever comes first.[342]

E. Administration of the Testate Estate

1. Requirement of Administration

Under Mississippi law and practice an executor or administrator c.t.a. will be appointed to administer the testate estate as soon as the will has been probated, provided that in estates where the personal property does not exceed $10,000 a will may be admitted to probate as a muniment of title only with-

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[338] MUPC, *supra* note 20, § 3-407.
[339] *Id.*
[340] MUPC, *supra* note 20, § 1-306(a).
[341] MUPC, *supra* note 20, § 3-412.
[342] MUPC, *supra* note 20, § 3-412(3).

out the necessity of the appointment of an executor or administrator c.t.a. to administer the estate.[343] It may be concluded that it has been the general policy in Mississippi to require that testate estates be administered.[344]

The MUPC is not in accord with this policy. Under its provisions, a will may be probated informally or formally without the necessity of the appointment of a personal representative to administer the estate.[345] The view of the MUPC is that administration of an estate is a procedure that is available to any interested person, but will not be employed unless and until one of those interested persons elects to institute it. Mississippi concurs with this view with regard to intestate estates, but not with testate estates. The reasons for the difference are not clear.[346]

2. *Mississippi Law*

In general, under Mississippi law the administration of a testate estate will be conducted like the administration of an intestate estate except to the extent that the will provides otherwise.[347] The will may relieve the executor of many statutory obligations, such as posting bond[348] and making inventories and accountings to the court.[349] However, it may not

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[343] *See* MISS. CODE ANN. §§ 91-7-35, 91-7-39 (1972).

[344] By analogizing the testate with the intestate situation, it may be contended that the statutes do not require that an executor be appointed whenever a will is probated. As has been noted previously, the statutes relating to intestate estates provide that letters of administration *shall* issue, but in actual practice it means that letters shall issue if someone petitions for their issuance. It seems reasonable to construe the testate statutes similarly so that the actual meaning is that letters testamentary will be granted if someone petitions for their issuance.

[345] UNIF. PROBATE CODE, art. III, gen. cmt. (5) (West 10th ed. 1991).

[346] It can be contended that the law has a duty to the decedent to see that the wishes and directions he expresses in a validly executed will are carried out. However, this is at odds with the view that a will should not be probated if all of the beneficiaries agree that the estate should be distributed in a manner different than that directed in the decedent's will. *See* Parker v. Broadus, 91 So. 394, 395 (Miss. 1922) (presenting this view).

[347] *See generally*, MISS. CODE ANN. §§ 91-7-47, 91-7-49 (1972).

[348] MISS. CODE ANN. § 91-7-45 (1972).

[349] *E.g.*, Harper v. Harper, 491 So. 2d 189, 200 (Miss. 1986) (allowing testator to waive executor's duty to account).

relieve him of the duty to give the required notice to creditors.[350] In addition, the will may empower him to do many things that he could not lawfully do otherwise without first obtaining the authority of the chancellor.[351] But unless relieved of an obligation, the executor must perform it, and he may not, without the prior approval of the chancellor, perform acts he is not empowered by the will or by statute to do.[352]

3. MUPC - Unsupervised Administration

Generally, administration of the testate estate begins with the appointment of a personal representative.[353] As discussed in section III.C.2.a. herein, the appointment may be sought through an informal appointment proceeding before the registrar or through a formal appointment proceeding before the court. As with Mississippi law, the person designated in the will shall be appointed, unless disqualified.[354] An objection to an appointment can be made only in a formal proceeding.[355]

As far as the personal representative's powers are concerned, there is little difference between the unsupervised administration of an intestate and a testate estate. Indeed, the powers of the personal representative are so broad that it would be difficult for the will to enlarge them.[356] It is more likely that the will would restrict the powers and discretion of the personal representative rather than enlarge them. For example, in an informal appointment proceeding the personal representative must file a bond if the will expressly requires

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[350] MISS. CODE ANN. § 91-7-49 (1972).

[351] *See, e.g.*, Davis v. Sturdivant, 19 So. 2d 499, 500 (Miss. 1944) (finding that executor was not required to give notice where will gave executor power to sell land).

[352] *See Harper*, 491 So. 2d at 200 (finding that executrix acted at her peril in paying attorneys' fees without prior court approval).

[353] MUPC, *supra* note 20, § 3-103. *See generally*, MUPC, *supra* note 20, §§ 3-301, 3-402.

[354] MUPC, *supra* note 20, § 3-203(a)(1).

[355] MUPC, *supra* note 20, § 3-203(b).

[356] However, if so authorized in the will the personal representative may engage in acts that would otherwise be prohibited as self-dealing. MUPC, *supra* note 20, § 3-713(1).

it.[357] There is no provision that the obligation to make an inventory may be waived by the will.[358] Subject to contrary provisions in the will, the unsupervised administration of the testate estate is generally the same as that of the intestate estate.

F. MUPC - Supervised Administration

It has already been noted in the previous discussions of the administration of intestate and testate estates under the MUPC that administration may be supervised or unsupervised. Previous sections have dealt with unsupervised administrations, which are more commonly used.

A supervised administration may be requested by the personal representative or by any interested person at any time by filing a petition therefore.[359] If a formal testacy and appointment proceeding has not already been held, the filing of a petition for supervised administration has the initial effect of instituting such a proceeding. The reason is that the court must adjudicate the testacy of the decedent and questions concerning the priority and qualification of the personal representative, regardless of whether the court decides to order a supervised administration.[360]

The court has discretion with regard to ordering a supervised administration.[361] It should be ordered only if the court finds that the circumstances of the estate make it necessary.[362] If the decedent's will directs it, supervised administration should be ordered unless the court finds it unnecessary because of changed circumstances since the execution of the will.[363]

If supervised administration is ordered, the personal representative becomes responsible to the court as well as to

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[357] MUPC, *supra* note 20, § 3-603.
[358] *See* MUPC, *supra* note 20, § 3-706.
[359] MUPC, *supra* note 20, § 3-502.
[360] *Id.*
[361] *See* MUPC, *supra* note 20, § 3-502.
[362] *Id.*
[363] MUPC, *supra* note 20, § 3-502.

interested parties, and the administration and settlement of the estate are put under the continuing authority of the court.[364] The court may, on its own motion or on the motion of any interested party, give the personal representative directions with regard to the estate.[365] The personal representative may not make any distribution of the property of the estate without a court order,[366] and he must close the estate through a formal closing proceeding.[367]

The ordering of a supervised administration does not in and of itself restrict the power of the personal representative to administer the estate, except for distribution[368] and closing.[369] As to other matters, the personal representative may administer the estate as if the administration were unsupervised unless he receives contrary directions from the court.[370] By ordering a supervised administration, the court does not create a situation like that which exists under Mississippi law when an administrator is administering an intestate estate, where the administrator can do little without the prior approval of the chancellor. However, the court in a supervised administration under the MUPC presumably could create such a situation by appropriate directions to the personal representative. Any restrictions which the court places on the powers of the personal representative must be endorsed on his letters of appointment in order to be effective as to persons dealing with him in good faith.[371]

G. Administration of the Estates of Nonresident Decedents

1. Mississippi Law

Mississippi law governs the inheritance of all property, real and personal, of a decedent that is located in Mississippi,

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[364] MUPC, *supra* note 20, § 3-501.
[365] *Id.*
[366] MUPC, *supra* note 20, § 3-504.
[367] MUPC, *supra* note 20, § 3-505; *see* UNIF. PROBATE CODE § 3-501 cmt. (West 10th ed. 1991).
[368] MUPC, *supra* note 20, § 3-505.
[369] MUPC, *supra* note 20, § 3-504.
[370] *Id.*
[371] *Id.*

regardless of where the decedent was domiciled at the time of his death.[372] If the decedent died intestate, Mississippi's law of intestate succession determines the inheritance of the Mississippi property.[373] If the decedent died testate, his will must be probated in Mississippi and found to be valid under Mississippi law in order for it to be a valid conveyance of Mississippi property.[374] If the will disposes of land located in Mississippi, the will may be contested in Mississippi[375] even if it has been contested and found to be valid in another state.[376]

The administration of the estate of a nonresident decedent is conducted like that of a resident decedent. All administrations are original since there are no ancillary administrations in Mississippi.[377] Consequently, the administration of a nonresident's estate in Mississippi may proceed regardless of what has gone on or is ongoing in the state of the decedent's domicile or elsewhere.

2. *MUPC*

The MUPC contains no provisions which specifically state whose law governs the inheritance of real and/or personal property located in Mississippi that was owned by a nonresident decedent. It appears that Mississippi land that passes by intestate succession would be inherited pursuant to the intestate succession provisions of the MUPC rather than the intes-

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[372] *See* Heard v. Drennen, 46 So. 243, 244 (Miss. 1908) (finding Mississippi law applied to ascertain rights to property in Mississippi which were derived from will made in another jurisdiction); Partee v. Kortrecht, 54 Miss. 66, 69 (1876) (applying Mississippi law where Tennessee resident died intestate while owning real property located in Mississippi).

[373] *Partee*, 54 Miss. at 70. The court clearly pointed out that this applied even if the decedent was domiciled in another state. *Id.*

[374] Belt v. Adams, 87 So. 666, 668 (Miss. 1921).

[375] MISS. CODE ANN. § 91-7-33 (1972).

[376] *See* Woodville v. Pizzati, 81 So. 127, 131 (Miss. 1919) (finding judgment of Louisiana court, which established instrument as will, was not conclusive where decedent's real estate was located in Mississippi). *But see*, Estate of Waitzman, 507 So. 2d 24, 25-26 (Miss. 1987) (giving full faith and credit to judgment of out-of-state court where will disposed of only personalty located in Mississippi).

[377] *Partee*, 54 Miss. at 70.

tate succession law of the decedent's domicile.[378] Apparently, personalty passing by intestate succession would generally be inherited pursuant to the law of the decedent's domicile if there is a domestic personal representative to whom it may be delivered. Otherwise, it would be inherited pursuant to the provisions of the MUPC.[379]

If the nonresident decedent died testate, his will must be probated in Mississippi for it to be effective as proof of the transfer of property.[380] If a court in another state has already adjudicated the validity of the will in a proceeding involving notice to and an opportunity for contest by all interested persons, that order must be accepted as determinative if it included a finding that the decedent was domiciled in that state.[381]

The MUPC prefers that any administration of the nonresident decedent's estate in Mississippi be conducted by the personal representative already appointed at the decedent's domicile, if there is one.[382] This domiciliary personal representative, or a person he nominates, has priority over all other persons to be appointed personal representative of the decedent's estate in Mississippi.[383] Indeed, no one else may be appointed in an informal appointment proceeding.[384] If there is no domiciliary personal representative a personal representative may be informally appointed in Mississippi when thirty days elapse after the decedent's death.[385] Someone other than a domiciliary personal representative may be appointed in a formal appointment proceeding if: (1) the domiciliary personal representative, after receiving notice of the proceeding, failed to request appointment or to nominate someone else,[386] or (2) the court found that the domiciliary

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[378] *See* MUPC, *supra* note 20, § 1-301.
[379] MUPC, *supra* note 20, § 3-816.
[380] MUPC, *supra* note 20, § 3-102.
[381] MUPC, *supra* note 20, § 3-408.
[382] MUPC, *supra* note 20, § 3-203(g).
[383] *Id.*
[384] MUPC, *supra* note 20, § 3-308(b); *see also* UNIF. PROBATE CODE § 3-308 cmt. (West 10th ed. 1991).
[385] MUPC, *supra* note 20, § 3-307(a).
[386] MUPC, *supra* note 20, § 3-203(e).

personal representative was unsuitable.[387] If a domiciliary personal representative or his nominee wishes to be appointed personal representative in Mississippi, he may obtain removal of the person previously appointed.[388]

Under the MUPC there are two methods by which a domiciliary personal representative may recover assets of his decedent located in Mississippi, other than by petitioning for the issuance of letters in Mississippi. First, sixty days after the death of a nonresident decedent, anyone indebted to the decedent or having possession of his property may pay the debt or deliver the property to the domiciliary personal representative upon being presented proof of his appointment and an affidavit setting forth that there is no local administration or application therefore pending and that the domiciliary personal representative is entitled to payment or delivery.[389] Second, the domiciliary personal representative may, if there is no Mississippi administration pending, file with the court authenticated copies of his appointment, any bond he has given, and the testamentary instrument he is administering.[390] He may then exercise all powers of a local personal representative[391] as to assets in Mississippi until such time as an application or petition for appointment of a local personal representative is filed.[392]

It should be noted that the spouse and/or children of a decedent not domiciled in Mississippi are not entitled to a homestead allowance, exempt property, or family allowance under the MUPC.[393] In addition, the spouse is also not entitled to elect to take an elective share of the decedent's estate.[394]

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[387] MUPC, *supra* note 20, § 3-203(f).
[388] MUPC, *supra* note 20, § 3-611(b).
[389] MUPC, *supra* note 20, § 4-201.
[390] MUPC, *supra* note 20, § 4-204.
[391] MUPC, *supra* note 20, § 4-205.
[392] MUPC, *supra* note 20, § 4-206.
[393] MUPC, *supra* note 20, § 2-401.
[394] MUPC, *supra* note 20, § 2-201.

IV. CONCLUSION

This article has dealt with the more notable differences between the existing Mississippi law of intestate succession, wills, and administration of estates, and the provisions of the proposed Mississippi Uniform Probate Code. It should be clearly understood that there are many other differences that have not been mentioned, and that the MUPC article dealing with protection of persons under disability has not been addressed at all. However, it is obvious from what has been covered that the enactment of the MUPC would bring a multitude of very significant changes to the law of Mississippi.

Few would contend that the law of Mississippi in these areas is perfect. Many governing statutes are over one hundred years old. Numerous changes have occurred in Mississippi in the interim. While the legislature has made significant changes from time to time, many would contend that more needs to be done to improve the state of the law.

By the same token, many people do not think that the official Uniform Probate Code is perfect. After some twenty years, only fifteen states have adopted it. Further, many states have adopted parts of it, while presumably rejecting the other parts. The heavily revised Article II, which is a part of the MUPC, has not yet been adopted by any state.

Therefore, for those who believe that the law of Mississippi needs further improvement, the issue would appear to be whether the improvement should come in the form of specific statutes designed to correct specific problems, or whether the better course is to repeal all of the statutes and replace them with the MUPC.

In other words, if the entire MUPC is enacted, most of Mississippi's current law on this subject will be repealed. If one believes that most of the current law is objectionable then this is the desired result. However, some believe that only parts of Mississippi's current law are undesirable and that parts of the MUPC are also unacceptable. If this is the case, the better approach might be to repeal certain parts of the Mississippi law and enact only certain parts of the MUPC or to simply amend some of the current statutes. The official

Uniform Probate Code specifically indicates that some states may only want to adopt certain sections or groups of sections. It is organized into free-standing acts in order to facilitate partial adoption. Therefore, the decision concerning whether to adopt the proposed MUPC depends on whether the person making the decision believes that most of the current Mississippi law needs to be changed or whether only a few particular statutes need to be corrected. There is no doubt that the question is one about which reasonable minds may differ. Also, there is no doubt that the answer will affect the lives of most Mississippians.

DIVIDING THE PROPERTY IN A MARITAL DISSOLUTION

Thomas W. Crockett
J. Randall Patterson[*]

I. INTRODUCTION

Just as divorcing spouses seldom agree as to what caused the erosion of their marriage, they less frequently agree as to what each individual should take when they part. The division of marital assets is certainly one of the principal, most emotionally charged issues in any divorce proceeding and may involve a myriad of assets ranging from a simple joint purchase to the valuation and division of a retirement fund or the rights to income from a professional degree. Additionally, the potential payment of alimony or support must be considered in any thorough examination of a marital property division.

When complex financial or property right issues present themselves in the domestic relations context, virtually any equitable and just result may be achieved if prepared and argued under the appropriate theory. While certain facts may limit the application of one theory, they may well facilitate the advancement of another. Additionally, the mere fact that some assets are held only in the name of one party, or that a party did not visibly contribute to the acquisition of those assets, does not automatically justify concession of ownership inter-

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ests or rights to an equitable interest by the spouse not holding legal title. While domestic relations property issues may at times seem routine, it is often the creative argument that captures the attention of the court and produces the desired and often very non-routine result.

The trial court has very broad discretion in divorce matters.[1] In making these "equitable and just"[2] orders concerning the division of marital assets, the court has recognized four specific types of relief: "(a) periodic alimony, sometimes called permanent or continuing alimony; (b) lump sum alimony or alimony in gross; (c) division of jointly accumulated property; and (d) award of an equitable interest in property."[3] No clear lines exist between these forms of remedy, nor are they mutually exclusive. As society becomes more complex, property divisions will also become more complex. This article will address some of those more complex concepts and will provide practical insight into an ever present and ever changing facet of the law.

II. ALIMONY

A. Traditional Theory

The traditional theory of alimony is based on the common law concept that a man should support his wife commensurate with his ability, in the style to which she has become accustomed.[4] Courts reason that if a man does not support his ex-wife, she will become a charge on society; and, as such, the public interest requires that he continue to support her.[5] Although this concept, which was significantly altered by the

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[1] MISS. CODE ANN. § 93-5-23 (Supp. 1992) (stating that trial court can make any "equitable and just" order concerning maintenance and alimony of wife or husband).

[2] *Id.*

[3] Bowe v. Bowe, 557 So. 2d 793, 794 (Miss. 1990) (stating that court has discretion to grant either form of relief or even combine relief forms).

[4] East v. East, 493 So. 2d 927, 931 n.2 (Miss. 1986) (indicating that husband has duty to see that his wife and children are supported within limits of his capabilities).

[5] *Id.* at 932.

United States Supreme Court in 1979,[6] may seem outdated in these days of emphasizing women's rights, it is still very much alive, as a practical matter, in Mississippi.[7]

The trial court has very broad discretion when deciding whether to award alimony. The Mississippi Code provides that "the court may, in its discretion, having regard to the circumstances of the parties and the nature of the case, as may seem equitable and just, make all orders . . . touching the maintenance and alimony of the wife or the husband."[8] Furthermore, Mississippi courts may hear matters concerning alimony even on divorces granted by foreign courts which failed to address the alimony issue.[9] Additionally, modern courts have the discretion to award alimony in several different forms.[10] It may be temporary or permanent, and may be awarded in periodic payments, lump sum payments or in payments that continue until a formerly dependent spouse is rehabilitated.[11]

The traditional form of alimony awarded by Mississippi courts is periodic alimony.[12] Periodic alimony is a monthly

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[6] Orr v. Orr, 440 U.S. 268, 282-83 (1979). In *Orr*, the Court held that an Alabama statute, which imposed alimony obligations on husbands but not wives, violated the Equal Protection Clause of the Fourteenth Amendment. *Id.* The Court found that there was no legitimate justification for the gender-based classification. *Id.* The only people who benefitted from the gender-based statute were wives who were financially secure and had needy husbands. *Id.* These wives would have to pay alimony under a gender-neutral statute, but escaped liability because the Alabama statute provided that alimony could only be paid by husbands. *Id.*

[7] Weiss v. Weiss, 579 So. 2d 539, 541-42 (Miss. 1991) (stating that concept of alimony originated from obligation of one spouse to support other spouse).

[8] MISS. CODE ANN. § 93-5-23 (Supp. 1992).

[9] *Weiss*, 579 So. 2d at 541. The court held that so long as the alimony issue had not been addressed by the foreign court, and as long as personal jurisdiction was satisfied, the alimony issue could be severed from the divorce issue and heard by a Mississippi court. *Id.*

[10] *Bowe*, 557 So. 2d at 794.

[11] *See* Gray v. Gray, 562 So. 2d 79, 80 (Miss. 1990) (affirming award of lump sum and periodic alimony); Skinner v. Skinner, 509 So. 2d 867, 870 (Miss. 1987) (awarding lump sum and periodic alimony); *see also* Otis v. Otis, 299 N.W.2d 114 (Minn. 1980) (affirming trial court's decision that maintenance terminates after 4 years); Roberts v. Roberts, 283 So. 2d 396, 397 (Fla. Dist. Ct. App. 1973) (reversing lower court's award of alimony).

[12] Cunningham v. Lanier, 589 So. 2d 133, 137 (Miss. 1991). The *Cunningham* court indicated that absent clear, unequivocal language to the contrary, the court

payment of a set sum, over which the court maintains continuing jurisdiction.[13] As such, periodic alimony awards are modifiable upon petition to the court,[14] and are generally terminated when the payor dies, or when the recipient dies or remarries.[15]

In addition, alimony may be awarded as a lump sum.[16] Lump sum alimony involves a single payment in satisfaction of any and all marital support claims against the paying spouse.[17] The single payment may be structured into multiple installments, so long as there is a final date of payment.[18] Lump sum alimony is most appropriate in circumstances where both parties have personally contributed to assets which are held in only one party's name at the time of the marital dissolution.[19] Also, a lump sum payment may be ordered in conjunction with periodic alimony.[20]

Finally, alimony may be awarded in the form of rehabilitative alimony.[21] Although not yet specifically addressed as

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will interpret provisions as periodic alimony. *Id.*

[13] *East*, 493 So. 2d at 931.

[14] *Id.*

[15] *Id.*; *see* Geiger v. Geiger, 530 So. 2d 185, 187 (Miss. 1988) (stating that periodic alimony terminated when wife remarried).

[16] *Bowe*, 557 So. 2d at 795.

[17] *See* Wray v. Wray, 394 So. 2d 1341, 1344 (Miss. 1981) (discussing fact that lump sum alimony is final settlement).

[18] *See* Queen v. Queen, 551 So. 2d 197 (Miss. 1989) (awarding lump sum alimony to be paid in installments); Holleman v. Holleman, 527 So. 2d 90, 92 (Miss. 1988) (stating that fixed and certain sum payable over definite period of time is lump sum alimony).

[19] *See* Skinner v. Skinner, 509 So. 2d 867, 870 (Miss. 1987). The court in *Skinner* awarded the wife a lump sum payment of her husband's $700,000 net worth that he accumulated during their marriage. *Id.*; *see also* Martin v. Martin, 566 So. 2d 704, 707 (Miss. 1990) (granting wife lump sum alimony of one-half interest in tract of land because she helped make payments).

[20] *See* Branton v. Branton, 559 So. 2d 1038 (Miss. 1990) (awarding wife lump sum and periodic alimony); Gray v. Gray, 562 So. 2d 79 (Miss. 1990) (holding that award of lump sum and periodic alimony was not abuse of discretion); Skinner v. Skinner, 509 So. 2d 867 (Miss. 1987) (awarding periodic and lump sum alimony).

[21] *See* Jordan v. Jordan, 510 So. 2d 131 (Miss. 1987). The Mississippi Supreme Court ordered Mr. Jordan, an attorney, to pay his wife, a school teacher, $250 a month for 24 months. *Id.*

such by the Mississippi Supreme Court, rehabilitative alimony is premised on the concept that the newly independent, and often financially disabled wife, will require only a temporary period of support.[22] Rehabilitative alimony has been used in other jurisdictions where the wife may not be entitled to periodic or lump sum alimony,[23] and by Mississippi courts in the form of temporary periodic alimony.[24] This support, by its very nature, is awarded only for a limited duration, during which the wife should presumably prepare to become self-supporting.[25]

When asserting or defending a claim, whether rehabilitative, periodic, or lump sum, under the traditional alimony theory, it is critical to analyze the facts of the particular case in light of the factors for periodic alimony as set out in *Brabham v. Brabham*[26] or the factors for lump sum alimony as set out in *Cheatham v. Cheatham*.[27] In *Brabham* the court held that the wife should be awarded a "reasonable sum" for alimony.[28] The "reasonable sum" should be determined in light of the nine factors that the court announced.[29] After

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[22] Turner v. Turner, 385 A.2d 1280, 1284-85 (N.J. Super. Ct. Ch. Div. 1978) (holding that rehabilitative alimony is appropriate award to give recipient time to become self-sufficient).

[23] *See, e.g.*, Otis v. Otis, 299 N.W.2d 114, 116-17 (Minn. 1980). The Minnesota Supreme Court upheld the trial court's award of rehabilitative alimony. *Id.* at 117. The court concluded that this form of alimony encouraged the wife to reclaim employment skills outside the home, which she had given up during the marital relationship. *Id.* at 116; *see also* Roberts v. Roberts, 283 So. 2d 396 (Fla. Dist. Ct. App. 1973) (refusing to award alimony to wife where husband's ability to pay was no greater than wife's ability to support herself).

[24] *See* Holleman v. Holleman, 527 So. 2d 90, 92 (Miss. 1988) (awarding wife $2,500 per month temporary periodic alimony for set term of ten years); Jordan v. Jordan, 510 So. 2d 131, 132 (Miss. 1987) (granting husband divorce on grounds of uncondoned adultery, but awarding wife rehabilitative alimony). *But see* Carpenter v. Carpenter, 519 So. 2d 891, 894-95 (Miss. 1988) (declining to award alimony when wife's net worth exceeded that of her husband).

[25] *Turner*, 385 A.2d at 1282. The court noted that rehabilitative alimony afforded the wife the advantage of planning her future with minimum financial concerns. *Id.*

[26] 84 So. 2d 147, 153 (Miss. 1955).

[27] 537 So. 2d 435, 438 (Miss. 1988).

[28] *Brabham*, 84 So. 2d at 153.

[29] *Id.* The *Brabham* court stated that the relevant factors to consider when

considering the relevant factors, the court found that, in that particular case, $150 per month for alimony was excessive.[30] Similarly, the *Cheatham* court discussed four factors that should be considered in awarding lump sum alimony.[31] The court in that case applied these factors and held that lump sum alimony was appropriate where the wife worked during the marriage while the husband accumulated assets.[32]

Recently, the Mississippi Supreme Court reaffirmed the *Brabham* factors and held:

> Alimony, if allowed, should be reasonable in amount, first deducting the resources of the wife and then finding an amount commensurate with the wife's accustomed standard of living, and considering the ability of the husband to pay. As long as the chancellor follows this general standard, the amount of the award is largely within his discretion.[33]

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awarding alimony and child support were:

(1) the health of the husband and his earning capacity;
(2) the health of the wife and her earning capacity;
(3) the entire sources of income of both parties;
(4) the reasonable needs of the wife;
(5) the reasonable needs of the child;
(6) the necessary living expenses of the husband;
(7) the estimated amount of income taxes the respective parties must pay on their incomes;
(8) the fact that the wife has the free use of the home, furnishings, and automobile, and
(9) such other facts and circumstances bearing on the subject that might be shown by the evidence.

Brabham, 84 So. 2d at 153; *see* Brendel v. Brendel, 566 So. 2d 1269, 1272-73 (Miss. 1990) (applying *Brabham* factors to determine amount of alimony award).

[30] *Brabham*, 84 So. 2d at 153.

[31] *Cheatham*, 537 So. 2d at 438. The four factors were:

(1) Substantial contribution to accumulation of total wealth of the payer either by quitting a job to become a housewife, or by assisting in the spouse's business;
(2) a long marriage;
(3) where recipient spouse has no separate income or the separate estate is meager by comparison;
(4) without the lump sum award the receiving spouse would lack any financial security.

Cheatham, 537 So. 2d at 438 (citations omitted).

[32] *Id.* at 440.

[33] Brendel v. Brendel, 566 So. 2d 1269, 1272 (Miss. 1990).

In addition, other factors the court considers may include disparity of the separate estates,[34] one spouse's dissipation of marital assets,[35] and whether the divorce was awarded because of fault.[36] Further, "[t]he chancellor should consider the reasonable needs of the wife and the right of the husband to lead as normal a life as possible with a decent standard of living."[37] Some courts also analyze the tax consequences of an alimony award.[38] This is of particular importance since the payment of alimony is tax deductible for the payor, and taxable income for the recipient.[39]

Historically, fault was an important consideration in the court's alimony decision.[40] Fault, especially adultery in a divorce case, traditionally barred any claims for alimony by the offending partner.[41] However, a more recent case, *Retzer v.*

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[34] *Cheatham*, 537 So. 2d at 438, *quoted in* White v. White, 557 So. 2d 480, 483 (Miss. 1989).

[35] Retzer v. Retzer, 578 So. 2d 580, 585-87 (Miss. 1990). In *Retzer*, the court discussed the wife's extravagant purchases and expenses as a factor to be considered when awarding lump sum alimony. *Id.*; *see* Lee R. Russ, Annotation, *Spouse's Dissipation of Marital Assets Prior to Divorce as a Factor in Divorce Court's Determination of Property Division*, 41 A.L.R.4TH 416 (1985).

[36] *Retzer*, 578 So. 2d at 592-93; *see also* Beacham v. Beacham, 383 So. 2d 146 (Miss. 1980). In *Beacham*, the Mississippi Supreme Court recognized that the general rule of law in Mississippi was that if a husband obtained a divorce based on the wife's fault, then the wife's own acts precluded her award of alimony. *Id.* at 148.

[37] *Brendel*, 566 So. 2d at 1272.

[38] *See* McCarty v. McCarty, No. 02A01-9203-CH-0082, WL 259255, at *2 (Tenn. Ct. App. Oct. 7, 1992) (indicating that tax consequences of alimony should be considered in alimony decision); Moore v. Moore, No. CN90-9741, 1992, WL 208359, at *7 (Del. Fam. Ct. July 29, 1992) (indicating that tax consequences are one of factors considered in deciding on alimony); Nicewonder v. Nicewonder, 602 So. 2d 1354, 1357 (Fla. Dist. Ct. App. 1992) (stating that in divorce action, trial court must consider consequences of income tax laws on distribution of assets and alimony).

[39] I.R.C. § 215 (1991).

[40] *Retzer*, 578 So. 2d at 592.

[41] *See* Martin v. Martin, 566 So. 2d 704, 707 (Miss. 1990) (awarding divorce on grounds of adultery and ordering equitable division of property with no payment of alimony). *But see* Jordan v. Jordan, 510 So. 2d 131 (Miss. 1987) (awarding adulterous wife temporary alimony); Wood v. Wood, 495 So. 2d 503 (Miss. 1986) (holding that adulterous wife was entitled to alimony where marriage had

Retzer,[42] indicates that fault is becoming less important in the division of marital property.

In *Retzer*, the chancery court awarded the husband a divorce on the grounds of adultery and simultaneously awarded the wife substantial lump sum and periodic alimony.[43] On appeal, the Mississippi Supreme Court relied on the *Cheatham* factors[44] to reverse the alimony award.[45] The court stated that in every previous lump sum alimony award, the wife had been granted the divorce,[46] and that as a rule, the wife is not granted periodic alimony when she was at fault.[47] In this opinion, however, the court hinted that alimony may, under certain circumstances, be granted even when the wife was at fault.[48] The court indicated that a wife who was at fault may sometimes receive periodic alimony, but usually only when she would otherwise be in "desperate need."[49] Such a situation could exist when the wife was at fault for a reason other than adultery,[50] when the marriage had lasted a particularly long

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lasted 36 years).

[42] 578 So. 2d 580 (Miss. 1990).

[43] *Retzer*, 578 So. 2d at 590.

[44] *See supra* note 30.

[45] *Retzer*, 578 So. 2d at 592. The *Retzer* court found that Mrs. Retzer satisfied one of the factors set forth in *Cheatham*. *Id.* Although the Retzer's had a long-term marriage, she failed to substantially contribute to their wealth and had an independent income. *Id.* Thus, the court held that Mrs. Retzer was not entitled to the award of lump sum alimony. *Id.*

[46] *Id.*

[47] *Id. Compare*, Wood v. Wood, 495 So. 2d 503 (Miss. 1986) (awarding adulterous wife alimony after 36 year marriage).

[48] *Retzer*, 578 So. 2d at 592; *see* Beacham v. Beacham, 383 So. 2d 146, 148 (Miss. 1980) (reversing alimony award because divorce was wife's fault and there was no "compelling need" to require support from her husband); Russell v. Russell, 241 So. 2d 366, 367 (Miss. 1970) (indicating that in some circumstances alimony can be awarded to wife even though she is at fault).

[49] *Retzer*, 578 So. 2d at 593.

[50] *See* Wires v. Wires, 297 So. 2d 900, 902-03 (Miss. 1974) (granting husband divorce on grounds of cruel and inhuman treatment, but awarding wife alimony due to her illness and willingness to resume her marital duties); Rainey v. Rainey, 205 So. 2d 514 (Miss. 1967) (granting divorce on grounds of cruel and inhuman treatment); Gatlin v. Gatlin, 161 So. 2d 782, 783 (Miss. 1964) (same); Shows v. Shows, 133 So. 2d 294, 295 (Miss. 1961) (same); Hibner v. Hibner, 64 So. 2d 756, 758 (Miss. 1953) (same); Carraway v. Carraway, 56 So. 2d 41, 41 (Miss. 1952) (granting divorce on grounds of desertion).

time,[51] or when the husband was financially able to pay some amount of alimony, and the wife had no other means of livelihood.[52]

The *Retzer* court declined to rule as to whether the wife's adultery, in and of itself, was a complete bar to alimony.[53] The court maneuvered free of this issue and pragmatically guaranteed Mrs. Retzer the same annual income ($88,000.00) which the chancery court had provided as periodic alimony.[54] In granting her the award, however, the court made it clear that the money was not to be characterized as periodic alimony, but rather as business profits based on Mr. Retzer's fiduciary duty to his wife as a business partner in their jointly held corporation.[55] Mr. Retzer was ordered to manage the corporation, including his wife's 49.8 percent ownership, in such a way as to guarantee her the specified awarded income.[56]

However, in the dissent to *Retzer*, Justice Prather argued for the more "enlightened view" that adultery, *per se*, should not preclude the chancery court as a matter of law from awarding alimony.[57] This "enlightened view" was subsequently adopted in *Hammonds v. Hammonds*,[58] where the court reversed a chancellor who summarily denied alimony solely due to the wife's adulterous behavior.[59] The court stated that

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[51] *Retzer*, 578 So. 2d at 593; *see also* Jenkins v. Jenkins, 278 So. 2d 446, 449-50 (Miss. 1973). The *Jenkins* court held a wife of 24 years was entitled to alimony when she lacked professional skills. *Id.*

[52] *Retzer*, 578 So. 2d at 593.

[53] *Id.* at 594. The court found that Mrs. Retzer's degree and her 49.8% ownership of the couple's restaurants enabled her to provide for herself, and on these grounds the court held that she was not entitled to alimony. *Id.*

[54] *Id.* at 596. The court held that the $88,000 was a fair return on the 1,600 shares she owned in the couple's five commercially successful McDonald's restaurants. *Id.*

[55] *Retzer*, 578 So. 2d at 596.

[56] *Id.*

[57] *Retzer*, 578 So. 2d at 602-08 (Prather, J., dissenting). Since the *Retzer* decision was that of only four of the justices, this approach may be softened the next time this issue is before the court. Also, the wife received an income of $88,000 per year for life from her share of the jointly owned property. *Id.* This may well be a distinguishing factor in future cases involving fault.

[58] 597 So. 2d 653 (Miss. 1992).

[59] *Hammonds*, 597 So. 2d at 655.

"adultery should not stand as an absolute bar to alimony, especially, we believe, when denial of alimony would render the wife destitute. Moreover, we see no reason why a distinction should be made between adultery and other grounds upon which a husband may be granted a divorce."[60] Therefore, as demonstrated by *Hammonds*, it appears that adultery is no longer an absolute bar to an award of alimony.

Furthermore, as in *Retzer*, when an alimony award is based on a business partnership rather than solely on the couple's marital relationship, the court, could essentially refuse to consider fault as a viable issue. The partnership theory, which is predicated entirely on ownership of corporate assets, may even apply to situations when the wife has not worked in, or contributed to, the business.[61] Spouses who do not own a legal share of a business or the marital assets, but who have contributed to the acquisition of those assets in any capacity, may be treated as "partners" by the court.[62]

B. Partnership Theory

The partnership theory is based on the notion that a man and woman who have lived together, regardless of a marital relationship, for a number of years have entered a *de facto* partnership.[63] When the partnership is dissolved, the partners own equitable shares of what they have accumulated together.[64] This concept, developed through case law, is currently applied by Mississippi courts.

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[60] *Id.* at 655; *see* Gammage v. Gammage, 599 So. 2d 569 (Miss. 1992) (granting wife divorce on grounds of cruel and inhuman treatment, and awarding alimony to prevent wife from being in desperate need).

[61] *Retzer*, 578 So. 2d at 594-95.

[62] *See* Rothman v. Rothman, 320 A.2d 496, 501-02 (N.J. 1974) (holding that wife's work in household during marriage contributed to their overall assets and entitled her to be treated as partner and thus, entitled to equitable distribution of such assets).

[63] Suzanne Reynolds, *Increases in Separate Property and the Evolving Marital Relationship*, 24 WAKE FOREST L. REV. 239, 328-33 (1989).

[64] *Id.* The author examined the difference between the utilization of the partnership theory in common law states as opposed to community property states. *Id.*

In *Chrismond v. Chrismond*,[65] the couple participated in a ceremonial marriage which was actually void because the man was already married at the time of the ceremony.[66] When their relationship dissolved, after years of living together under the guise of marriage, the man defended the wife's claim for a share of the marital assets by asserting that their marriage was void *ab initio*.[67] The court, however, did not accept his argument and allowed the wife to recover a share of the marital property, reasoning that even if no valid marriage existed, the Chrismonds had entered into a "partnership."[68] Since the individuals were "partners," equity required that the woman share in the assets that they had jointly accumulated.[69] Further, in *Taylor v. Taylor*,[70] the man and woman had never been formally married, but had lived together as man and wife.[71] Over a vigorous dissent, the court relied on *Chrismond* and held that by applying the partnership theory, the woman could recover an equitable interest in the assets acquired by the man during the time that they had lived together.[72]

Later the court again, but less reluctantly, applied the partnership theory to a case with similar facts. In *Pickens v. Pickens*,[73] a man and woman had lived together for twenty years without being married.[74] During this time, they had accumulated assets for the benefit of their children.[75] In uphold-

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[65] 52 So. 2d 624 (1951), *cert. denied*, 342 U.S. 878 (1951).

[66] *Chrismond*, 52 So. 2d at 626.

[67] *Id.* at 627-28.

[68] *Id.* at 628-29. The *Chrismond* court noted that the woman entered into an arrangement with Mr. Chrismond whereby she lived with him, cared for him and his household, and assisted him in the accumulation of property. *Id.* at 628.

[69] *Id.*

[70] 317 So. 2d 422 (Miss. 1975).

[71] *Taylor*, 317 So. 2d at 422.

[72] *Id.* at 423.

[73] 490 So. 2d 872, 875 (Miss. 1986).

[74] *Pickens*, 490 So. 2d at 873. The couple had previously been married for 14 years. *Id.* They were divorced in 1962 and began living together again as man and wife in 1963. *Id.* This "partnership" continued until 1983, at which time Ms. Pickens commenced the present proceeding to obtain equitable division of the property which they had accumulated during the 20-year period. *Id.*

[75] *Id.* at 874. The trial court noted that both of the parties admitted that

ing an equitable division of their accumulated property, the *Pickens* court stated that, "Where parties such as these live together in what must at least be acknowledged to be a partnership and where, through their joint efforts, real property or personal property, or both, are accumulated, an equitable division of such property will be ordered upon the permanent breakup and separation."[76]

Another way of expressing the idea behind the partnership theory is to make use of the constructive trust theory.[77] "A constructive trust arises where a person who holds title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it."[78] Constructive trusts and partnerships are commonly used by chancery judges, and may be useful tools of the advocate in appropriate fact situations.[79]

Mississippi abolished common law marriage in 1956.[80] As such, in the case of the dissolution of a nonmarital relationship or the death of one partner, the survivor has no legal claim to any portion of the assets. However, even in the absence of a legal marriage, the claimant or surviving partner should argue that through the partnership analogy, he or she would have a right to an equitable share of the "partnership" assets, just as if he or she had engaged in a business partnership rather than in a personal relationship. The claimant could also, or alternatively, argue the constructive trust theory. In cases such as

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they held themselves out to the community as being married and likewise conducted themselves as husband and wife. *Id.* at 873.

[76] *Id.* at 875.

[77] *See generally* Michael Diehl, Note, *The Trust in Marital Law: Divisibility of a Beneficiary Spouse's Interest on Divorce*, 64 TEX. L. REV. 1301, 1326-74 (1986) (discussing development of trust theory in domestic law).

[78] 5 A. SCOTT & W. FRATCHER, THE LAW OF TRUSTS § 462, at 304 (4th ed. 1989).

[79] *See* Jones v. Jones, 532 So. 2d 574, 583 (Miss. 1988) (discussing constructive trust theory and indicating that it is still used in Mississippi even though some other states have declined to use it); Dudley v. Light, 586 So. 2d 155, 158 (Miss. 1991) (discussing use of constructive trust theory); Allgood v. Allgood, 473 So. 2d 416, 421 (Miss. 1985) (stating that constructive trust is used to prevent unjust enrichment).

[80] MISS. CODE ANN. § 93-1-15 (1972).

Taylor and *Pickens*, where the parties are not legally married, these equitable theories may be the best available method of recovery, whether the parties are going through a divorce or one of the partners has died.

III. EQUITABLE DISTRIBUTION

The equitable distribution theory, as described in *Jones v. Jones*,[81] combines the traditional alimony and partnership approaches.[82] The concurring opinion in *Jones* addressed equitable distribution, which assumes a moderate position between the legal obligation imposed by the alimony theory and the less defined partnership theory.[83] In her concurrence, Justice Prather suggested, implicitly, that Mississippi should adopt the equitable distribution theory, which would require the chancery court to make an equitable distribution of marital property regardless of how title to the couple's property is held.[84] While the concurring opinion specifically addressed giving the chancery court the power to divest a party of ownership to real property, its real thrust was that the law should provide the wife with an absolute right to an equitable distribution, rather than merely allowing the chancery court the discretion to make

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[81] 532 So. 2d 574 (Miss. 1988).

[82] *Jones*, 532 So. 2d at 579. In *Jones*, the husband and wife accumulated various property holdings during their marriage, throughout which, the wife primarily acted as a homemaker and assisted in clerical duties in the husband's business. *Id.* at 576. The divorce resulted due to the husband's physical abuse of the wife, over several years. *Id.* The court held that a spouse could be awarded money in proportion to his or her assistance in accumulating real property. *Id.* at 580. Therefore, the court found no reason that a spouse should be unable to receive title to real property. *Id.* at 580. The court upheld an interspousal title conveyance of some of the accumulated real property. *Id.* Mrs. Jones' contribution to the accumulation of property entitled her to an equitable share in the jointly accumulated real property. *Id.*

[83] *Id.* at 582-84 (Prather, J., concurring).

[84] *Id.* (Prather, J., concurring). Justice Prather contended that the court should recognize Mrs. Jones' contribution as a homemaker as a material contribution to the accumulation of the real property. *Id.* This contribution alone is sufficient justification for title divestment. *Id.* at 581; *see* Betty Mallett, Note, *Family Law—Marital Property Distribution—Where Divorcing Spouse Contributed to Acquisition of Marital Real Property, Court-Ordered Divestment Title Was Equitable*, 59 MISS. L.J. 591 (1989) (concentrating on *Jones* decision and cases leading up to it).

such distributions.[85] This theory is focused on the "well recognized premise that homemaking services . . . may be considered as [contribution] toward the acquisition"[86] of marital assets, giving the wife as much of an interest in the property as if she had made a direct monetary outlay.

Recently, in *Cleveland v. Cleveland*[87], the court applied the doctrine of equitable distribution. In this case, the husband came into the marriage bankrupt; however, during the course of the marriage he accumulated a sizeable estate.[88] The wife had no assets and was unemployed when the marriage ended.[89] The court discussed at length the ownership of different assets, their value, and the payor spouse's income.[90] Also, the court indicated that under these facts, the most important factor to be considered was the disparity of the separate estates.[91] The court then reversed and remanded on the periodic alimony issue, increasing the amount from $600 to $1,000 per month and removing an automatic seven year termination of alimony.[92] The court also remanded to increase the lump sum alimony from $50,000 to a reasonable amount based on the

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[85] *Jones*, 532 So. 2d at 581 (Prather, J., concurring). Justice Prather advocated a system in which the court would divide the assets into marital property and separate property. *Id.* at 582 (Prather, J., concurring). The marital property would become the marital estate and be subjected to equitable distribution, based on several factors, including contribution as a homemaker. *Id.* (Prather, J., concurring).

[86] *Id.* at 583 (Prather, J., concurring) (citations omitted); *see, e.g.*, Jenkins v. Jenkins, 278 So. 2d 446, 449 (Miss. 1973) (awarding lump sum alimony in recognition of spouse's contribution as homemaker).

[87] 600 So.2d 193 (Miss. 1992).

[88] *Cleveland*, 600 So. 2d at 196.

[89] *Id.*

[90] *Id.* at 197.

[91] *Id.* at 197. The court listed several other factors that should be considered. *Id.* First, assistance by one spouse as a housewife or as an assistant in the business. *Id.* at 197 (quoting Tutor v. Tutor, 494 So. 2d 362, 364 (Miss. 1986)). Second, a long marriage should be considered. *Id.* (quoting *Jenkins*, 278 So. 2d at 449). Third, it should be considered if the separate estate of one spouse is meager in comparison to the other spouse's assets. *Id.* (quoting *Jenkins*, 278 So. 2d at 449). A final consideration is whether "without a lump sum award one spouse would lack financial security." *Id.* (quoting Abshire v. Abshire, 459 So. 2d 802, 804 (Miss. 1984).

[92] *Id.* at 198.

Cheatham factors.[93]

Since the equitable distribution doctrine is relatively new to Mississippi, practitioners may need to draw upon the case law from other jurisdictions that use the doctrine. Practitioners should not hesitate to bring cases from other jurisdictions to the court's attention. Although there has been little note of it in reported cases, the Mississippi Supreme Court can be expected to look for guidance from the decisions of other jurisdictions which have had equitable distribution for a longer time.[94]

Generally, the outcome of a case will probably be the same under the equitable distribution theory or the partnership theory.[95] Therefore, a practitioner should not be overly concerned with which theory the court chooses to apply to justify its award. The Mississippi alimony statute,[96] as discussed previously, clearly gives the chancery court broad discretion, and as long as an award is reasonable, the supreme court generally affirms. Consequently, the name the court gives the theory may seem unimportant. After all, a rose "by any other name would smell as sweet."[97]

However, the theory of recovery presented to the court may

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[93] *Cleveland*, 600 So. 2d at 198. The dissent in *Cleveland* did not question the equitable distribution award but would have also remanded for a determination of the periodic alimony, rather than rendering. *Id.* at 198 (Lee, J., dissenting). The dissent felt that the chancellor could not consider all relevant factors if half the decision concerning alimony was not within his authority to change. *Id.* The reasoning of the dissent ignores the realities of litigation. While it may be technically true that a case should be remanded for the lower court to make this determination, litigation, especially in the domestic relations context, must have an end, and the sooner the better for all concerned. The Mississippi Supreme Court is in a reasonably good position to determine what is fair and equitable. It seems unreasonable to prolong the controversy and legal expenses through repeated and unnecessary remands.

[94] *See generally* Doris Jonas Freed & Timothy B. Walker, *Family Law in the Fifty States: An Overview*, 22 FAM. L.Q. 367, 392-453 (1989) (listing various states and their treatment of equitable distribution).

[95] *See* Jacquelyn J. Fatula, Note, *Family Law—Pennsylvania Acknowledges the Reality of the Professional Degree/Divorce Decree Couple*, 64 U. PA. L. REV. 281, 287 (1991) (explaining equitable distribution as deriving from concept that marriage was in effect partnership).

[96] MISS. CODE ANN. § 93-5-23 (1992).

[97] WILLIAM SHAKESPEARE, THE TRAGEDY OF ROMEO AND JULIET, act 2, sc. 2 (John E. Hawkins ed., Penguin Pub. 1960).

become more important depending upon the facts of each individual case, especially when fault is an issue. As we have seen, under the traditional alimony theory, if the payee is guilty of sufficient fault, then generally little, if any, alimony is awarded.[98] Conversely under the partnership theory, fault is less relevant to the court's allocation of the assets.[99] However, all courts will inevitably consider fault to some degree when dividing up the property in a divorce. Therefore, the competent attorney, when deciding which theory to emphasize, should consider the extent to which the client or the other party bears the fault. Also, an awareness of which theory the chancery judge hearing your case prefers may give your client a marked advantage.

The facts of a particular case will largely dictate the most appropriate theory to apply. For instance, in a divorce where you represent a wife who worked hard for many years and contributed to the husband's wealth and raised his family, but in her later years decided to have a little excitement and got caught having an affair, the divorce strategy should center on the partnership theory. Studying the Pickens case, for example, might be useful in this situation. The husband's attorney, conversely, would assert traditional alimony principles which prevent an award of alimony to the party at fault. Nevertheless, in some cases, both theories may operate to one partner's advantage. *Schilling v. Schilling*[100] provides a classic example of the wife having both theories working for her. In *Schilling*, the parties had been married for twenty years.[101] The wife had worked hard in helping the husband acquire a large estate, and the husband was guilty of adultery.[102] The wife received

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[98] *See* Beacham v. Beacham, 383 So. 2d 146, 147 (Miss. 1980) (stating general rule that alimony not allowed for wife when divorce is granted due to wife's misconduct); Russell v. Russell, 241 So. 2d 366, 367 (Miss. 1970) (reversing decree awarding wife alimony where divorce occurred due to her fault, although she was not financially independent).

[99] *See Taylor*, 317 So. 2d at 423 (allowing division of assets under partnership theory where there was no lawful marriage).

[100] 452 So. 2d 834 (Miss. 1984).

[101] *Shilling*, 452 So. 2d at 834.

[102] *Id.* at 834-35. The Schillings were married in 1960, at age 19. *Id.* In 1967, Mrs. Schilling quit her job in order to campaign for her husband who was run-

approximately one-third of the husband's estate, plus substantial periodic alimony.[103] However, even when one party clearly deserves a considerable award, as here, the court faces the further burden of determining how to divide the marital assets. Such distributions often raise many novel and complicated questions for the court to resolve.

IV. COMPLEX ASSETS

Three of the most complex and frequently contested assets are advanced degrees, closely held businesses or professional practices, and pension plans. In addition, assets held jointly by the spouses, also give rise to peculiar problems during a divorce action.

A. Advanced Degrees

In many divorces, the ownership and value of an advanced degree is the most important asset held by either of the parties and is the most important question the court must decide.[104] Courts in virtually all states are struggling with this difficult issue.[105] Often a dispute over ownership of an advanced degree arises when a marriage ends after the wife quit school to take care of the children and helped support her husband while he obtained the degree. The husband, although he has a substantial earning capacity, may still be deeply in debt from his graduate school and may be unable to pay any substantial sum at the time of the divorce. Such a situation makes it difficult for the court to enter a property division order that is "equita-

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ning for chancery court clerk. *Id.*

[103] *Id.* at 835. The chancellor found Mr. Schilling's net worth to be $750,000 and awarded Mrs. Schilling a lump sum alimony award of $250,000. *Id.* The court awarded monthly alimony of $1,500 to be reduced to $1,000 upon payment of the lump sum award. *Id.*

[104] *See infra* pp. 24-28 (discussing valuation issues).

[105] *See* Linda S. Balisle & David E. Joanis, *Compensation on Dissolution of Marriage for Special Contributions to Education*, 31 AM. JUR. *Trials* 1, 17 (1984) (listing various states and their treatment of complex assets); Michael G. Walsh, Annotation, *Spouse's Professional Degree or License as Marital Property for Purpose of Alimony, Support or Property Settlement*, 4 A.L.R.4TH 1294, 1294-1301 (1981) (covering treatment of this complex asset by various states).

ble and just."[106] A solution to this dilemma is not beyond the ingenuity of our courts, but as with alimony theories, the courts have not established a standard uniform approach, and probably never will. The courts simply try to do what is fair and equitable in each individual case.

The following cases provide some examples of the way courts have dealt with this problem in the past. In *Robinson v. Irwin*,[107] the wife had put the husband through law school and helped finance the opening of his law office.[108] She proved that she contributed $28,000 to her husband while he was in law school.[109] Also, she showed a contribution of $6,900 to their IRA, $11,000 to their savings account and $1,200 toward the purchase of furniture for her husband's office.[110] The court held that the lump sum award was inadequate and was an abuse of discretion by the lower court.[111] Therefore, the court reversed the lump sum award of $5,400 and remanded the case for the chancery court to reconsider the amount of the award.[112] Under similar facts in *McIntosh v. McIntosh*,[113] the court reversed a chancery court award and awarded $10,000.00 in lump sum alimony to the wife based on her contributions while the husband was in school.[114] The chancellor did not use any particular process to determine the value of the wife's contribution to the husband's education.[115] Instead, the chancellor simply said that since the husband

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[106] MISS. CODE ANN. § 93-5-23 (Supp. 1992).

[107] 546 So. 2d 683 (Miss. 1989).

[108] *Robinson*, 546 So. 2d at 683. The parties married in 1980. *Id.* The wife worked as an accountant when they married and continued working while her husband was in law school at the University of Mississippi. *Id.* Her earnings were the couple's primary source of income. *Id.*

[109] *Id.* at 686.

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] 378 So. 2d 629 (Miss. 1979).

[114] *McIntosh*, 378 So. 2d at 631. The parties were married while the husband was in law school. *Id.* The wife quit school and went to work so that the husband could complete school. *Id.* The court based its decision to award $10,000 to the wife on the fact that she paid for most of her husband's education. *Id.*

[115] *Id.*

lived in a home that was given to him by his parents, but the wife still owed $9,800 on the home she was living in, the court should award the wife $10,000.[116] In these cases, the court seemed more interested in making some type of equitable payment to the wife for her contributions, than in giving her a share of the potential value of the husband's professional degree.

However, in *McNally v. McNally*,[117] the court was unable to award the wife even an equitable interest at the time of the divorce, because her "investment" in her husband's degree had not yet begun to yield a profit.[118] The husband had recently completed dental school at the time of the divorce, and was not in a financial position to pay any alimony.[119] The court sustained the chancery court's refusal to award any alimony, but directed the lower court to retain jurisdiction over the alimony issue until the husband's future income justified an appropriate alimony award.[120]

It is eminently practical for a court to retain jurisdiction over the alimony issue until a spouse is earning enough money to pay alimony, but this approach is fraught with danger for the professional. Assuming, for discussion purposes, that the husband is a professional who does well in later years, he is subject to litigation with an award based on his then-current, and rising, income. In such fact patterns, he would do well to consider using some of the credit frequently available to young professionals, and to borrow a sufficient amount of money to negotiate a lump sum settlement. A property settlement agreement providing such a release of future income should include a clause adequate to fully protect him from future claims.[121]

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[116] *Id.*

[117] 516 So. 2d 499 (Miss. 1987).

[118] *McNally*, 516 So. 2d at 499. The husband filed for divorce several weeks after graduation from dental school. *Id.* at 500.

[119] *Id.* at 501.

[120] *Id.* at 503.

[121] *See* Bowe v. Bowe, 557 So. 2d 793, 794-95 (Miss. 1990) (indicating need for making it clear that it is lump sum settlement). An example of a clause to protect the spouse from future claims is:

Wife understands that Husband has completed his [describe training] and

Obviously, in this case, the wife's attorney should attempt to maximize the effect of her contributions to the attainment of the husband's professional degree.[122] In addition to showing the dollar value of the advanced degree and her personal contributions toward the acquisition of it, the wife should also attempt to emphasize her lost career opportunities and her losses in personal earning capacity.[123] She may also present evidence of her lowered standard of living resulting from her support of her then husband while he completed graduate school. The husband's attorney, conversely, should emphasize that the wife enjoyed a high or reasonable standard of living during her spouse's school days, and that his income during that period came from sources other than her. Additionally, if applicable, it should be shown that the wife is at fault in the marital breakup and that the husband is financially destitute and unable to pay alimony.[124]

These considerations obviously apply to cases where the

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will earn a substantial income, which may increase. This payment by Husband is made solely to obtain a complete release from Wife of all claim to Husband's professional practice and any future income and is lump sum, not periodic, alimony.

[122] *See* Balisle & Joanis, *supra* note 102, at 68-82 (discussing various theories of compensation for contribution toward increasing future earnings potential of spouse); *see also supra* note 102; *see generally*, Philip Eden, Annotation, *Forensic Economics - Use of Economists in Cases of Dissolution of Marriage*, 17 AM. JUR. P.O.F.2D 345 (1978).

[123] *See* Mark A. Sessums, *What Are Wives' Contributions Worth Upon Divorce?: Toward Fully Incorporating Partnership Into Equitable Distribution*, 41 FLA. L. REV. 987, 989-91 (1989). The spouse should focus on two factors in determining the marital estate: (1) interruption of the spouse's education or career and (2) each spouse's contribution toward the marital assets. *Id.*

[124] *See generally* Daniel E. Burke, Comment, *'Til Graduation Do We Part—The Professional Degree Acquired During Marriage as Marital Property Upon Dissolution: An Evaluation and Recommendation for Ohio*, 56 U. CIN. L. REV. 227 (1987) (addressing equitable and property remedies for spouse who has supported other spouse through school); Katherine Hein, Comment, *Family Law—Pennsylvania Acknowledges the Reality of the Professional Degree/Divorce Decree Couple*, 64 TEMP. L. REV. 281 (1991) (discussing recognition of spouse's degree as marital asset, and contributions of one spouse in attaining the degree); Brenda R. Sharton, Note, *Spousal Interest in Professional Degrees: Solving the Compensation Dilemma*, 31 B.C. L. REV. 749 (1990) (discussing reimbursement, restitution, compensation through division, and other options).

degree has not yet begun to be profitable. However, if the parties stay married long enough for the husband to begin to realize income potential from his profession, then the husband has a more complicated defense and the wife is in a much stronger position.[125] At such a time, the advanced degree will have matured into an actual interest in a professional practice, which necessitates additional considerations.

B. Closely Held Business or Professional Practice

Interests in professional practices and closely held businesses are similar to interests in advanced degrees and present similar problems. Although the wife often has contributed to the business's value over the course of the marriage, the husband typically retains ownership of the business after a divorce.[126] Also, the practice or business, which may not produce significant immediate cash, may be the only item of any significant value that the parties have accumulated. Here again, the Mississippi courts have shown their ingenuity in resolving such amorphous circumstances and claims. In the past, the Mississippi Supreme Court has estimated the value of the business and ordered the husband to pay lump sum alimony in installments based on that value.[127] Another option has been for the court to participate in a forced sale of the property. In at least one case, the court affirmed the chancery court's order to have the closely held business appraised, sold, and the proceeds divided between the parties.[128]

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[125] *See, e.g.*, Tutor v. Tutor, 494 So. 2d 362 (Miss. 1986).

[126] *See* Martin v. Martin, 566 So. 2d 704, 707-08 (Miss. 1990) (awarding husband right to operate chicken farm).

[127] *See* Clark v. Clark, 293 So. 2d 447, 449 (Miss. 1974) (holding where wife contributed to business by working in it, as well as being a housewife, chancellor had discretion to award lump sum alimony based on her share in business' assets); *see also* Lee R. Russ, Annotation, *Spouse's Right to Discovery of Closely Held Corporation Records During Divorce Proceeding*, 38 A.L.R.4TH 145 (1985) (asserting that court has wide discretion to allow discovery of business records, even where spouse has minority or unknown interest in business).

[128] Martin v. Martin, 566 So. 2d 704, 707-08 (Miss 1990) (giving each party opportunity to buy out other's interest or alternatively to sell business and divide proceeds equally).

Furthermore, when the main asset in the marriage is a corporation, dividing it can be difficult, especially where the corporation itself is not directly involved in the suit. It would be easier for the court to deal with interests in closely held corporations if those corporations themselves were made parties to the divorce proceeding. This possibility will be discussed later.[129]

C. Pensions or Retirement Plans

Dividing pension assets as part of a divorce action presents several unique problems. Pension assets usually represent only future income, and thus are difficult to value.[130] Additionally, they are similar to advanced degrees and interests in closely held corporations, in that pension rights may have accrued while the parties were married, but may not have ripened into current income.[131] Accordingly, disputes concerning pension assets have become a fertile field for litigation.[132]

In addition, military pension rights deserve special mention. Until recently, courts have followed *McCarty v. McCarty*,[133] and held that the Supremacy Clause forbade states to distribute a serviceman's pension according to state community property laws.[134] However, the Federal Uniformed Services Former Spouses' Protection Act[135] eliminated the *McCarty* rule.[136] As *Brown v. Brown*[137] explains, rights in

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[129] *See infra* pp. 29-31; *see also* Skinner v. Skinner, 509 So. 2d 867, 870 (Miss. 1987) (holding since corporation was not made party to proceedings, chancellor's award of corporate property to wife was error).

[130] *See generally* Thomas S. Forkin, *Practical Approach to Pensions Evaluations and Orders*, 1991 JUV. & FAM. CT. L.J. 39, 40-41 (stating that some pensions are so speculative they are difficult to classify as assets and difficult to value, therefore, determining date of valuation is initial step in valuation process).

[131] *Id.* at 40.

[132] *See* Charles C. Marvel, Annotation, *Pension or Retirement Benefits as Subject to Award or Division by Court in Settlement of Property Rights Between Spouses*, 94 A.L.R.3D 176, 180-83 (1979) (discussing fact that although pension may be "entirely uninvested," some jurisdictions classify them as community property).

[133] 453 U.S. 210 (1981).

[134] *McCarty*, 453 U.S. at 232-35.

[135] 10 U.S.C. § 1408(c)(1) (Supp. 1990).

[136] *Id.* This statute enabled a state court to treat retirement pay of servicemen

military pensions are now governed by each state's laws pertaining to the property of its residents.[138] *Brown* further held that military retirement benefits are a "part of the income stream available to divorcing spouses which the chancery court is charged to consider in fixing the amount of alimony."[139]

Also, the domicile of the parties while the pension was being earned is important. If the parties were domiciled in a community property state while the pension was earned, for example, then the law of that state could determine the rights to the pension.[140] Whether an advance degree that is earned while the spouses were domiciled in a community property state is subject to the same rule, is a question the court will probably be asked to address at some point. The partnership theory may well be a worthwhile argument to make in such a convoluted and novel case.

D. Jointly Held Assets

Property held jointly by the parties presents another set of questions peculiar to divorce cases. When one spouse purchases property jointly in both spouses' names, a presumption exists that the buyer intended to give the other spouse a one-half ownership interest in that property.[141] The buying spouse can overcome this presumption only by a showing of clear and con-

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"as property of the member and his spouse in accordance with the law of the jurisdiction of such court." *Id.*

[137] 574 So. 2d 688 (Miss. 1990).

[138] *Brown*, 574 So. 2d at 690. The act removed the prohibition upheld in *McCarty* and opened the door for states to subject military pensions to their personal property laws. *Id.*

[139] *Id.* at 691.

[140] *See* Newman v. Newman, 558 So. 2d 821, 824-25 (Miss. 1990) (holding that wife's property right in husband's military pension was governed by law of states of serviceman's domicile while he was in armed forces); Petters v. Petters, 560 So. 2d 722, 724 n.1 (Miss. 1990) (noting wife could possibly recover share of husband's military pension if she showed husband earned part of pension while domiciled in Texas, which is community property state); Southern v. Glenn, 568 So. 2d 281, 284 (Miss. 1990) (holding spouse's rights in husband's military pension were governed by law of state, or states, pro rata, of domicile when pension was earned).

[141] Miller v. Miller, 298 So. 2d 704, 706 (Miss. 1974).

vincing evidence to the contrary.[142] Although it may be a difficult task, the buying spouse may be able to introduce sufficient evidence to rebut this weighty presumption.[143]

In *Blanchette v. Blanchette*,[144] the buying spouse was able to overcome the presumption that his wife owned one-half of certain jointly held stock. In this case, the wife took no part in the joint stock purchase and did not know that the stock certificates were issued, nor how many shares were acquired.[145] The husband claimed that he had placed the certificates in their joint names only to avoid probate, since property held jointly by both spouses would automatically pass to the survivor.[146] The court affirmed a decree which held the husband did not make a gift of the stock to the wife because he had not indicated by conduct or words that he intended to transfer any present interest in the stock.[147] Additionally, in *Jenkins v. Jenkins*[148] and in *Keyes v. Keyes*,[149] delivery was the test of ownership. In both of those cases the husband had placed the stock certificates or bonds in both his wife's name and his name, but had not delivered the certificates either to the wife or to a third party for her benefit.[150] As such, there was no delivery and no completed gift.[151] Clearly then, where an attorney represents the alleged donor, it may be a serious mistake to automatically concede one-half of all property held jointly.

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[142] *Id.*; *see* Reeves v. Reeves, 410 So. 2d 1300, 1303 (Miss. 1982) (holding joint account in name of both spouses was vested equally in both parties, absent evidence to contrary).

[143] *See* Regan v. Regan, 507 So. 2d 54, 56-57 (Miss. 1987) (finding that equitable division of certificate of deposit was not warranted where overwhelming evidence showed money came from husband's maritime personal injury claim).

[144] 287 N.E.2d 459 (Mass. 1972).

[145] *Blanchette*, 287 N.E.2d at 461.

[146] *Id.*

[147] *Id.*

[148] 278 So. 2d 446, 449 (Miss. 1973).

[149] 171 So. 2d 489, 491 (Miss. 1965).

[150] *Keyes*, 171 So. 2d at 491; *see Jenkins*, 278 So. 2d at 449 (husband kept possession of stock at all times).

[151] *Jenkins*, 278 So. 2d at 449.

V. VALUATION OF ASSETS

Valuation is a critical aspect of any divorce case. Primarily, when dealing with the valuation of assets, competent counsel should consider using every means to persuade the chancery court that his client's contribution to the marriage was great and the opponent's was small. For example, any homemaking services provided by the wife should be valued and counted as a part of her contribution to the couple's assets.[152] This strategy is important because of the chancery court's broad discretion and the lack of guidelines either by statute or by case law. As advocates, we must not only maximize our clients' contributions to the marriage and minimize our opponents' contributions, but we must also maximize the value of the assets we expect our opponent to take from the marriage, and minimize the value of the assets that we expect our clients to take. It is generally recognized that certain assets, such as the marital home, are consistently awarded to the wife, especially if there are small children by the marriage.[153] Other assets, such as interests in a family business or in the value of an advanced degree, will probably remain with the person who personally developed that asset.[154] However, the trial court still must assign value to and apportion many assets that do not fall within these traditional categories.[155]

Competent valuation in most types of cases is easily attainable. Real estate values in eminent domain cases, the value of spousal contributions in personal injury cases, and the value of closely held corporations in gift and estate tax cases have established valuation methods.[156] The techniques employed in

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[152] *Pickens*, 490 So. 2d at 876.

[153] *See* Dudley v. Light, 586 So. 2d 155, 158 (Miss. 1991) (awarding wife use of marital home where there was minor child involved).

[154] *Cf. Clark*, 293 So. 2d at 449 (holding where wife contributed to asset's development, court may award her equitable share).

[155] *See* Tutor v. Tutor, 494 So. 2d 362, 363 (holding award of husband's coin collection to wife was not error).

[156] *See generally* Sonja A. Soehnel, Annotation, *Necessity That Divorce Court Value Property Before Distributing It*, 51 A.L.R.4TH 11, 27-50 (1987) (discussing necessity of valuations generally).

those situations are generally equally applicable to divorce cases, with a few important differences: personal injury, eminent domain, and estate tax cases, unlike divorce cases, frequently involve anticipating a large verdict, or a client who is well able to pay costly expert witness fees. While many divorce cases involve meaningful sums of money, clients are frequently unable to bear the expenses of high-priced expert witnesses. The chance of a large verdict is also diminished, because the amount of the award is always limited by the ability of the defendant to pay. Thus, divorce counsel must be able to present evidence on the value of assets involved in a divorce, without spending large amounts of the clients' money.

An excellent initial source of valuation is the client's accountant.[157] The client's personal accountant is usually familiar with the financial condition of the client, thereby reducing costly fact-gathering efforts. Also, an accountant who has a relationship with the client and has an expectation of future business from that client may not charge the higher rates of an expert retained specifically for a particular case. Additionally, even if not consulted initially, the client's accountant should review the property settlement to insure that it addresses all necessary details, such as, which payments are child support, who gets the dependency deduction, and whether all appropriate IRS releases are executed.

An accountant serving as an expert can be useful in many ways.[158] Such an expert can examine the income tax returns of a party and in some cases provide testimony on a number of issues regarding income, expenses, profits and losses. Accountants can also be helpful in attaining and presenting in court an accurate financial analysis of the client or of the ex-spouse.

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[157] Before using the client's accountant, however, be aware that you may be waiving the client-accountant privilege found in MISS. CODE ANN. § 73-33-16 (1972). Therefore, to preserve this privilege, you may want to consider using other professionals as witnesses. *See* Nick Istock, Inc. v. Research-Cottrell, Inc., 74 F.R.D. 150, 151 (W.D. Pa. 1977) (holding plaintiff's calling accountant as witness waived privilege pertaining to matters in issue); *see also* Savino v. Luciano, 92 So. 2d 817, 818-19 (Fla. 1957) (holding defendant calling accountant as defense witness waived privilege).

[158] *See generally* Nancy Zeldis, *Accountants: The Key to Matrimonial Suits*, 198 N.Y. L.J. 1 (1987).

By such analysis, accountants can be very helpful in evaluations of closely held or personal businesses.

As a valuation tactic, the payee spouse should use extensive discovery to obtain copies of all financial statements the payor has furnished to any lending institutions for the purpose of obtaining credit. Generally, such statements are inflated, or at least present the prospective debtor's assets in the most favorable light, with no discount for a reduction in value caused by a forced sale nor consideration of the income tax consequences of such a sale. An argument can be made that in determining the amount of a lump sum alimony award, the court should consider the possibility that the value of the assets, as asserted by the payor spouse, may be discounted for various reasons. The net worth, and thus the amount upon which the lump sum award should be based, could be drastically reduced by such an approach.

In addition, when valuing the marital assets, the court may consider the value of the goodwill attributable to a professional practice or closely held business.[159] Although it is perhaps better to have a forensic economist testify on the valuation of goodwill, as well as on other valuation issues,[160] frequently it is cost prohibitive. Again, accountants or other knowledgeable acquaintances of the client may be useful as witnesses in presenting the most favorable view of a business's good will.

Furthermore, besides accountants, other professionals may be helpful in the valuation process. The client's life insurance agent, financial planner, or stockbroker can provide expert evidence on the values of life insurance policies,[161] stock op-

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[159] *See* Martin J. McMahon, Annotation, *Divorce and Separation: Goodwill in Medical or Dental Practice as Property Subject to Distribution On Dissolution of Marriage*, 76 A.L.R.4TH 1025, 1048-92 (1990) (discussing valuation of goodwill regarding chiropractors, dentists, physicians, veterinarians, and other professionals); Martin J. McMahon, Annotation, *Valuation of Good will in Accounting Practice for Purposes of Divorce Court Property Distribution*, 77 A.L.R.4TH 609, 612-13 (1990) (listing methods by which valuation of goodwill in accounting practice are made).

[160] *See supra* note 119.

[161] *See* Jay M. Zitter, *Method of Valuation of Life Insurance Policies In Connec-*

tions,[162] and personal injury awards.[163] Any of these professionals may be competent under the Federal Rules of Evidence to offer his or her opinion on the value of any of the marital assets.[164] Life insurance professionals and financial planners, with their skill in the use of actuarial tables and computation of the present value of future income, may also be helpful in computing the present value of advanced degrees, closely held businesses and pension plans.

VI. TRIAL CONSIDERATIONS

A. Procedural

The Mississippi Rules of Civil Procedure[165] are applicable except where they are in conflict with specific statutes.[166] The only specific statutory conflicts are the provisions in the divorce statute requiring an affidavit of non-collusion[167] and the provision that admissions in the answer may not be considered as evidence.[168] In every case where the issue of the applicability of the Rules has been raised, the Court has consistently held that the Rules apply to divorce proceedings. For example, in *Weiss v. Weiss*,[169] the Court held that Rule 15(b)[170] allowed

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tion with Trial Court's Division of Property, 54 A.L.R.4TH 1203, 1205 (1987) (noting insurance policy is "intangible" and must have method of valuation if it is to be distributed).

[162] *See* Eric Hollowell, *Valuation of Stock Options for Purpose of Divorce Court's Property Distribution*, 46 A.L.R.4TH 689, 692-98 (1986) (stating methods of valuation vary widely among tribunals and can prove difficult to implement).

[163] *See* Frank D. Wagner, *Propriety of Consideration of, and Disposition as to, Third Persons' Property Claims in Divorce Litigation*, 63 A.L.R.3D 373 (1975) (indicating that under some circumstances trial court will consider and resolve property claims, alleged or actual, including personal injury claim, of third persons during divorce).

[164] FED. R. EVID. 702.

[165] All references to "Rules" are to Mississippi Rules of Civil Procedure.

[166] MISS. R. CIV. P. 81(a). Rule 81(a) states that the rules govern all civil actions except those covered by statutory procedures.

[167] MISS. CODE ANN. § 93-5-7(7) (Supp. 1992).

[168] MISS. CODE ANN. § 93-5-7(3) (Supp. 1992).

[169] 579 So. 2d 539 (Miss. 1991).

[170] Rule 15(b) states, "when issues not raised by the pleadings are tried by expressed or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." MISS. R. CIV. P. 15(b).

the chancery court to make an alimony award when the complaint had only asked for separate maintenance, because the alimony issue was tried by the consent of the parties.[171] Further, in *Queen v. Queen*,[172] the court discussed the effect of Rule 54(c)[173] when the court awarded alimony, even though the plaintiff had not demanded it in the complaint.[174] The *Queen* court held that the Rule 54(c) prohibition against the awarding of a monetary judgment in an amount "greater than that demanded in the . . . amended pleadings" did not prevail over Rule 15(b).[175] Also, *Mayoza v. Mayoza*[176] involved the application of default principles to an uncontested divorce action and contains a thorough discussion of the applicability of the Rules to a divorce action.[177]

In addition to the applicability of the Rules, another procedure consideration that is useful in the domestic relations context is the possible joinder of corporations to a divorce action. The Court will allow an action for partition to be combined with an action for divorce, on the sensible ground that if a party can proceed separately for this relief, she can certainly seek it "as an incident to her action for divorce."[178] Since a partition suit requires all parties who have an interest in the property to be joined,[179] this reasoning would also allow a corporation in which the wife claimed an interest to be joined as a

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[171] *Weiss*, 579 So. 2d at 542-43. By failing to object or raise due process considerations at trial, the court held that the husband consented to the court ruling on the issue of alimony, even though the matter was not addressed in the pleadings. *Id.*

[172] 551 So. 2d 197 (Miss. 1989).

[173] Rule 54(c) states, "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled . . . however, final judgment shall not be entered for a monetary amount greater than that demanded in the pleadings or amended pleadings." MISS. R. CIV. P. 54(c).

[174] *Queen*, 551 So. 2d at 199-202.

[175] *Id.* at 201-02 (quoting MISS. R. CIV. P. 54(c)).

[176] 526 So. 2d 547 (Miss. 1988).

[177] *Mayoza*, 526 So. 2d at 548-50. *Compare* 9 OHIO R. CIV. P. 75(F) ("The provisions of Rule 55 shall not apply in divorce, annulment, or alimony actions").

[178] Johnson v. Johnson, 550 So. 2d 416, 419 (Miss. 1989) (stating that suit is allowable pursuant to Married Women's Act, MISS. CODE ANN. §§ 93-3-1, 93-3-3 (1972)).

[179] MISS. CODE ANN. § 11-21-5 (Supp. 1992).

party.[180] Rules 18 and 19 seem to facilitate such joinder of a corporation.[181] Also, recent decisions of the Mississippi Supreme Court imply that it would consider granting relief against a closely held corporation, if the corporation was a party to the suit.[182]

Other states have already recognized the joinder of corporations to a divorce action as a means of relief. In *Hughes v. Hughes*,[183] the Alabama Court of Civil Appeals allowed the wife to join General Motors Corporation as a party defendant to her divorce action.[184] She used Alabama Rule of Civil Procedure 19,[185] which, like the Mississippi equivalent, is modeled on the Federal Rules.[186] The court stated that General Motors was joined because the husband's:

> automobile dealership agreement with General Motors prohibited the transfer of ownership of any stock of Ray Hughes Chevrolet, Inc. without the knowledge and consent of General Motors. Since the wife's petition for divorce requested that the trial court award her a share in her husband's dealership, she moved to have General Motors made a party to her suit.[187]

Further, in *Moon v. Moon*,[188] the wife found it necessary to

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[180] *See* Anzalone v. Anzalone Bros., Inc., 449 A.2d 1310, 1313 (N.J. Super. Ct. App. Div. 1982) (holding that corporate defendant was proper party in divorce proceeding).

[181] Rule 18 provides for the joinder of "as many claims as [plaintiff] has against an opposing party." MISS. R. CIV. P. 18(a). Rule 19 provides that a person (or corporation) shall be joined as a party if "in his absence, complete relief cannot be accorded among those already parties." MISS. R. CIV. P. 19(a)(1).

[182] *See* Skinner v. Skinner, 509 So. 2d 867, 870 (Miss. 1987) (stating that corporate property could not be awarded because corporation was not made party); East v. East, 493 So. 2d 927, 933 (Miss. 1986) (stating that corporation had no duty to pay wife when not made party to suit). *Compare* Elkins v. Elkins, 228 So. 2d 105, 108-09 (Fla. Dist. Ct. App. 1969) (awarding some corporate assets to wife although corporation was not joined, based on evidence that property was purchased for her use).

[183] 362 So. 2d 910 (Ala. Civ. App. 1978), *vacated*, 441 U.S. 901 (1979).

[184] *Hughes*, 362 So. 2d at 916.

[185] Rule 19(a) provides for the joinder of another party if necessary to obtain full relief. ALA. R. CIV. P. 19(a).

[186] Federal Rule 19(a) allows a person to be joined when "in the person's absence complete relief cannot be accorded." FED. R. CIV. P. 19(a).

[187] *Hughes*, 362 So. 2d at 916.

[188] 229 S.E.2d 440 (Ga. 1976); *see also* Feldman v. Feldman, 100 N.W.2d 211,

join two corporations as party defendants.[189] Less than a month before Mrs. Moon filed for divorce, Mr. Moon in an attempt to keep his real estate out of an eventual property division, transferred the property to two corporations.[190] The court permitted the joinder of the corporations, since the transfers were potentially fraudulent.[191] As illustrated by these two cases, other states acknowledge that in order to achieve a fair division of marital assets, corporate assets may need to be considered. Thus, according to the Mississippi Rules of Civil Procedure and the rules in most states, a corporation may have to be joined in the divorce action so that its assets, belonging to one of the parties, can be divided.

B. Injunctions

If an attempt to join a corporation as a defendant is unsuccessful, a client may still be afforded some relief through other procedures. Rule 65, which permits the issuance of injunctions and temporary restraining orders to prevent the dissipation of assets, may provide plaintiffs with at least some security during pending divorce proceedings.[192] This rule is generally used to prevent a business partner from dissipating corporate assets, but can be applied to family law practice in analogous situations.[193] One example of the application of Rule 65 in this context is that an emergency injunction could be used to protect a wife and children from a husband's wasting the marital assets in reckless disregard of his duties to his family. For instance, in *Griffin v. Griffin*,[194] the lower court granted the

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212 (Mich. 1960) (discussing joinder of corporation where husband allegedly formed corporation to put his assets beyond reach of wife).

[189] *Moon*, 229 S.E.2d at 441.

[190] *Id.*

[191] *Id.*

[192] Rule 65 grants a judge the power to issue injunctions and temporary restraining orders to prevent injury to a party. MISS. R. CIV. P. 65.

[193] *See* Gooding v. Gooding, 602 So. 2d 615, 616 (Fla. Dist. Ct. App. 1992) (holding that wife could obtain temporary restraining order to protect corporate assets held jointly with husband); *In re* Marriage of Joerger, 581 N.E.2d 1219, 1223 (Ill. App. Ct. 1991) (listing requirements for injunctive relief).

[194] 579 So. 2d 1266 (Miss. 1991).

plaintiff wife two restraining orders that ordered the husband not to dispose of certain assets.[195] Also, in *Klumb v. Klumb*,[196] the court granted an injunction preventing the husband from removing furniture and other items from the marital home.[197]

An injunction or restraining order can be very useful to protect the marital assets during a pending divorce. *Hollerbach v. Hollerbach*[198] provides an example where the wife requested a Temporary Restraining Order (TRO) to protect the assets of a corporation which were allegedly marital property.[199] In *Hollerbach*, the wife applied business principles to the extent of asking that a receiver be appointed for the corporate marital property.[200] She alleged that the corporation was either insolvent or in immediate danger of becoming insolvent.[201] The receiver in *Hollerbach* was empowered to borrow money if necessary to preserve the marital estate, and in fact the estate was in receivership for several years.[202] This form of relief may be more acceptable to courts than joinder of the corporation as a defendant. The Florida District Court of Appeals indicated its preference for injunctive relief in *Thoni Transport Co., Inc. v. Thoni*,[203] where it dismissed the corporate defendants, but suggested that the plaintiff wife might amend her complaint to ask for an injunction preventing the sale of corporate assets.[204]

Additionally, injunctive relief may be used when the marital assets at issue are not part of a corporation. A TRO issued to banks, brokerage firms, pension plan administrators, and other persons who have custody of the husband's assets may help preserve them as well.[205] In *Miller v. Miller*,[206] the

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[195] *Griffin*, 579 So. 2d at 1266.

[196] 194 So. 2d 221 (Miss. 1967).

[197] *Klumb*, 194 So. 2d at 223.

[198] 368 S.E.2d 413 (N.C. Ct. App. 1988).

[199] *Hollerbach*,, 368 S.E.2d at 414.

[200] *Id.*

[201] *Id.*

[202] *Id.*

[203] 155 So. 2d 838 (Fla. Dist. Ct. App. 1963).

[204] *Thoni*, 155 So. 2d at 838.

[205] *See In re* Marriage of Johnston, 149 Cal. Rptr. 798, 802 (Cal. Ct. App.

plaintiff alleged that her "husband's wealth and property had been accumulated since their marriage, and partly" due to her help.[207] The husband, faced with a divorce action, had allegedly "threatened and intended to convey, incumber, and secrete his property so as to defeat her marital rights therein."[208] To prevent this, the trial court granted an injunction against the husband and those alleged to have custody of his property.[209]

However, when using TRO's to protect marital assets attorneys should keep in mind some of the issues presented by *Brueck v. Winters National Bank & Trust Co.*[210] In *Brueck*, the wife was granted a restraining order to prevent the bank from paying her husband any moneys on deposit at the bank.[211] Yet, at the time the restraining order was issued and received by the bank, the plaintiff husband did not have an account there.[212] Within hours, he opened an account, deposited a substantial amount of money, and then withdrew it all later the same day.[213] The court held that the bank had not acted improperly, since the restraining order's phrasing covered only funds presently on deposit, and not future deposits.[214] Furthermore, the court cautioned that restraining orders are literally "temporary;"[215] they are enforceable only until they expire, usually upon issuance of a final decree in the divorce.[216] For example, if the party seeking the TRO wants to continue to enjoin the bank, the terms of the TRO must be incorporated into the final divorce decree. Otherwise, the TRO

1978) (joining pension plan holding community assets in divorce proceeding), *cert. denied sub nom.* Southern California IBEW-NECA Pension Plan v. Johnston, 444 U.S. 1035 (1980).

[206] 159 So. 112 (Miss. 1935).

[207] *Miller*, 159 So. at 114.

[208] *Id.*

[209] *Id.* at 114-15.

[210] 38 N.E.2d 422 (Ohio Ct. App. 1941).

[211] *Brueck*, 38 N.E.2d at 423.

[212] *Id.* at 423-24.

[213] *Id.* at 424.

[214] *Id.* at 426-27.

[215] *Id.* at 424.

[216] *Brueck*, 38 N.E.2d at 425.

dissolves and frees the asset when the divorce decree is entered.[217] It is crucial that care be taken both with the grammatical construction of the TRO and with the final decree, to be certain that if necessary the TRO is incorporated into the judgment.

Using injunctions to prevent a person from disposing of his assets raises interesting possibilities. Could a court enjoin a husband from taking a lower-paying job, or from becoming unemployed?[218] In the *Retzer* case, discussed earlier, the court set a minimum income that the husband had to make from a corporation he owned jointly with his ex-wife. The court, in settling the wife's property division, required that the husband manage the assets of the jointly-owned corporation to guarantee the wife a certain set income.[219] Additionally, as the cases discussed in this section indicate, the court can also prevent a husband from wasting or spending his assets to defeat the wife's attempt for relief. Courts apparently have no qualms about limiting one spouse's spending or dissipation of assets,[220] nor about overseeing the management of a business.[221] It would seem that the next step might be an attempt to compel a husband to continue at a certain job, or at least to maintain a certain level of income, in order to satisfy

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[217] *See generally* Sappington v. Sappington, 147 So. 2d 494, 497-99 (Miss. 1962) (holding ex-husband in criminal contempt for failing to live economically); Lewis v. Lewis, 57 So. 2d 163, 165 (Miss. 1952) ("[C]ourt's power to commit a divorced husband to jail . . . depends on his then present ability to comply with the decree . . .").

[218] *Retzer*, 578 So. 2d at 580; *see supra* text accompanying notes 51-53.

[219] *Retzer*, 578 So. 2d at 594-95.

[220] *See, e.g.*, Moon v. Moon, 229 S.E.2d 440, 441 (Ga. 1976) (discussing joinder of corporations due to husband's alleged fraudulent transactions with them); Miller v. Miller, 159 So. 112, 114-15 (Miss. 1935) (stating that court granted injunction because husband allegedly threatened to incumber and secrete his property to keep it away from wife); Brueck v. Winters Nat'l Bank & Trust Co., 38 N.E.2d 422, 426-27 (Ohio Ct. App. 1941) (discussing issuance of temporary order to restrain husband's bank from paying him any money).

[221] *See, e.g.*, Retzer v. Retzer, 578 So. 2d 580, 594-95 (Miss. 1990) (requiring husband to make sure wife received $7,000 per month from corporation in which they were only shareholders); Hollerbach v. Hollerbach, 368 S.E.2d 413, 414 (N.C. Ct. App. 1988) (recognizing that husband's separately owned corporate assets were marital property and subject to equitable distribution).

court-ordered alimony or support payments.[222] However, such an order might well run afoul of the Thirteenth[223] and Fourteenth[224] Amendments to the United States Constitution. The payor's attorney, in light of these possible problems, would probably have a strong constitutional argument should a court take this tactic and order such prolonged performance by the payor spouse.

VII. CONCLUSION

When litigating property division and spousal support issues, judicial precedent is of limited value. This is primarily the result of two factors: the factual distinction of each divorce, and the courts' broad latitude to make such orders as are "equitable and just" under the circumstances. Further, as society's perception of the marital relationship changes, what is recognized as equitable and just will also change.

As women become further emancipated and are treated more as equals by society, we will see a diminution in the traditional alimony concept that a man must support his ex-wife so that she will not become a charge on society. This outmoded concept will undoubtedly be replaced by the concept that a wife

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[222] *See generally* Commonwealth *ex rel.* Mazon v. Mazon, 63 A.2d 112, 114 (Pa. Super. Ct. 1949) (holding that husband could not "abandon his employment, reduce his wages, or by other conduct bring about reduced income" in order to avoid making support payments); Kenneth Turner, *Contempt and Punishment for Non-Support*, 1985 JUV. & FAM. CT. J. 87, 89-90 (stating that chronically unemployed ex-spouses may be held in willful contempt for failure to provide support); Douglas R. Oelschlaeger, Comment, *Voluntary Retirement of Alimony: Obligors After* Ellis v. Ellis, 65 IOWA L. REV. 1098, 1099-1104 (1980) (examining case where ex-husband was required to continue alimony payments after retirement).

[223] U.S. CONST. amend. XIII, § 1. The Thirteenth Amendment states that, "[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." *Id.*

[224] U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment states, in part that, "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *Id.*

who provides homemaking and child rearing services is a full partner in the family unit and, on its dissolution, is entitled to her share of the partnership's material gains. Predictably, we should therefore see a decline in the importance of periodic alimony and a greater emphasis on lump sum or equitable distribution awards. Although the *Brabham* and *Cheatham* factors will continue to provide guidelines, the valuation of the marital assets will play a larger role in divorce cases, and will increase the value of expert testimony in such trials. As such, the best that we as litigators can do is to identify the prevailing attitude of the court and then fashion our cases accordingly.

As family law practitioners become more accustomed to working with the liberal procedure rules, especially those concerning joinder of causes of action and parties, divorce cases will undoubtedly become even more complex. These trends, coupled with the abolition of inter-spousal immunity, will predictably result in partition suits, tort actions, and corporate shareholder disputes being tried as part of divorce lawsuits. These issues along with the tax and bankruptcy questions that are inherent in any divorce put to rest forever the idea that all a lawyer needs to maintain a successful divorce practice is "a code, a couch, and a Corona."

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COMMENTS

TRYING JUVENILES AS ADULTS: IS THE SHORT TERM GAIN OF RETRIBUTION OUTWEIGHED BY THE LONG TERM EFFECTS ON SOCIETY?

I. INTRODUCTION

Presently, every state has some type of juvenile court or special treatment for child criminals. However, each state also recognizes that some juveniles may need more severe punishment than the maximum punishment available in juvenile courts. In recognition of this fact, all of the states have some type of waiver process, whereby, a juvenile may be removed from juvenile court and transferred to criminal court. Transfer of a juvenile to criminal court may be accomplished by judicial waiver, legislative waiver or prosecutorial waiver.

However, special points should be considered in deciding whether to try a juvenile as an adult. First, generally the punishment a juvenile receives in juvenile court is less than the punishment he would receive in criminal court. Although, it is possible that a juvenile who has a long prior record in juvenile court may be treated more leniently if he is transferred to criminal court. Second, juveniles do not have the same mental capacity as adults. Every person goes through a series of mental stages called egocentrism, before he or she becomes an adult. Thirdly, the possibility of a class bias

should be considered in the transfer decision. Many juveniles are from lower class families and are members of a minority group. Further, prison experience is typically more harsh and less helpful to youths than the experience in juvenile training centers. The latter provide better training to help youth fit into society after being released. Finally, a very important consideration in the transfer decision is that a juvenile may receive capital punishment if he is tried as an adult. Egocentrism should be a factor in this capital punishment decision also.

This comment will give a brief history of the juvenile court system, discuss the three methods of waiving a juvenile case to criminal court and discuss the points that need to be considered in the transfer decision.

II. HISTORY AND PURPOSE OF THE JUVENILE COURTS

The practice of treating juvenile criminals differently from adult criminals dates back to early English law.[1] Under the common law, a child under the age of seven could not be charged with a criminal offense.[2] The law assumed that they could not have the requisite *mens rea*.[3] However, if a child was between seven and fourteen years of age, a rebuttable presumption was made that they could not possess criminal intent.[4] Children who were fourteen years of age and older were presumed to have the same criminal capacity as adults.[5]

Juvenile corrections in the United States dates back to

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[1] VICTOR L. STREIB, JUVENILE JUSTICE IN AMERICA 5 (1978). The first time a court was formally called a juvenile court was in 1899. *Id.*

[2] *Id.*; *see* Etta J. Mullin, Note, *At What Age Should They Die? The United States Supreme Court Decision With Respect To Juvenile Offenders And The Death Penalty*, Stanford v. Kentucky *and* Wilkins v. Missouri, 109 S. Ct. 2969 (1990), 16 T. MARSHALL L. REV. 161, 161-65 (1990) (presenting background of juvenile justice system).

[3] STREIB, *supra* note 1, at 5.

[4] *Id.* Conviction of a child, between the ages of seven and fourteen required convincing proof that the child understood that his or her actions were wrong. Mullin, *supra* note 2, at 163.

[5] STREIB, *supra* note 1, at 5. Actually, it was possible for a child over the age of seven to be arrested, tried and punished as an adult. *In re Gault*, 387 U.S. 1, 16 (1967).

the New York House of Refuge in 1825.[6] The system was established to protect children from harsh criminal penalties, to separate the children who had not committed crimes from the ones who had, to provide better values and role models for children and to treat these children as victims and not offenders.[7] By 1925, every state, except two, had some type of juvenile court act, and in 1938, the federal government passed such an act.[8] Today every state has some type of juvenile court act. The acts vary, but they share some characteristics including: extensive background check, nonadversary proceeding, and individualized consideration of the juvenile.[9] The main purpose of the juvenile acts is to provide treatment and rehabilitation.[10] The individualized treatment is due to the general belief that children are not capable of having criminal intent and the presumption that they are not as mature as adults.[11]

A juvenile is "[a] young person who has not yet attained the age at which he or she should be treated as an adult for purposes of criminal law."[12] This age may be seventeen in some states,[13] but under the Federal Juvenile Delinquency Act, a juvenile is someone under the age of eighteen.[14] Never-

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[6] STREIB, *supra* note 1, at 6. Also, the Chicago Reform School was established in 1855 to treat children instead of punishing them. *Id.* The establishment of such indicated the desire to keep children out of adult institutions. *Id.*

[7] *Id.* The juvenile system developed out of the "fatherly" or protective treatment of children. *Id.*

[8] *Id.*

[9] W. James Ellison, *State Execution of Juveniles: Defining "Youth" As a Mitigating Factor For Imposing A Sentence of Less Than Death*, 11 LAW & PSYCHOL. REV. 1, 9 (1987). From the beginning of these acts until 1967, juveniles were denied procedural rights. STREIB, *supra* note 1, at 7. The states believed they had a right to deny children procedural rights because they were acting *in loco parentis* to protect the child. *In re* Gault, 387 U.S. at 16. The belief was that a child did not have a right to liberty, but did have a right to custody. *Id.* at 17.

[10] Ellison, *supra* note 9, at 9. In *Gault*, the Supreme Court held that children were entitled to due process, just as adults are. *In re* Gault, 387 U.S. at 2.

[11] Ellison, *supra* note 9, at 9. The Supreme Court in *Kent*, stated that the objectives of a juvenile court are "to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment." Kent v. United States, 383 U.S. 541, 554 (1966).

[12] BLACK'S LAW DICTIONARY 867 (6th ed. 1990).

[13] *Id.*; *see infra* app. A.

[14] 18 U.S.C.A. § 5031 (West Supp. 1991). The next section of the code pro-

theless, every state makes some provisions for trying juveniles in criminal court when they have committed serious criminal offenses.[15] Therefore, juveniles who commit serious criminal offenses face the possibility of being treated as an adult criminal defendant.[16] Thus, the question is: Should a juvenile be punished as an adult?

III. WAIVER

The act of moving a juvenile's case from juvenile court to criminal court is called transfer or waiver. In effect, the juvenile court waives jurisdiction over the case and transfers the case to criminal court. Most juvenile courts now focus on two things: rehabilitation of the juvenile and protecting society.[17] Punishment is not included in a juvenile court's goals.[18] Therefore, youths described as chronic, serious, violent, sophisticated, mature or persistent, are thought to be beyond the purpose of the juvenile court system.[19]

A. The Impact of the Kent *Factors on Judicial Waiver*

Initially, the juvenile courts were given total discretion to decide whether to waive a particular case.[20] However, in

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vides for the transfer to the attorney general in the appropriate district court of juveniles who are fifteen years of age or older who have committed certain offenses. 18 U.S.C.A. § 5032 (West Supp. 1991).

[15] Ellison, *supra* note 9, at 9. Where a juvenile's history of past offenses or the severity of their present offense demonstrates to the juvenile court that rehabilitation is not beneficial to society, the juvenile court can recommend that the juvenile be tried as an adult. *Id.* at 10; *see infra* app. A.

[16] Ellison, *supra* note 9, at 10. It is possible for a juvenile, who has been transferred to a criminal court, to receive the normal punishment given to adults, even death. *Id.*

[17] Mullin, *supra* note 2, at 164. This reflects the belief that juveniles are not as responsible for their acts as adults are and that juveniles are more responsive to rehabilitation. *Id.*

[18] *Id.*

[19] Gilbert Geis & Arnold Binder, *Sins of their Children: Parental Responsibility for Juvenile Delinquency*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 303, 338 (1991). When a juvenile commits a crime that indicates that he or she fits under one of these descriptive terms, society becomes outraged and demands retribution. Mullin, *supra* note 2, at 164.

[20] Geis & Binder, *supra* note 19, at 338. The judges' decisions were informal

1966, in *Kent v. United States*,[21] the United States Supreme Court limited the waiver discretion of the juvenile courts.[22] In *Kent*, the court held that a juvenile was to be entitled to "a waiver hearing, representation by counsel, access to information upon which the waiver decision was to be based, and a statement of reasons justifying the waiver decision."[23] In an attached memorandum, the court set out some factors that a juvenile judge might want to consider when deciding whether to waive jurisdiction.[24] The court also stated that an offense

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and very subjective. *Id.* Judicial waiver still retains a great deal of the subjectivity and discretion, despite attempts to eliminate it. *Id.* at 339.

[21] 383 U.S. 541 (1966).

[22] *Kent*, 383 U.S. at 541. In *Kent*, the prosecution charged the defendant with housebreaking, robbery and rape. *Id.* The juvenile court transferred his case to criminal court, after "full investigation." *Id.* The court convicted Kent of housebreaking and robbery. *Id.* On appeal, the defendant challenged the validity of the waiver, and the United States Supreme Court held the waiver invalid. *Id.*

[23] *Id.* at 542. The court set out these due process requirements because waiver of jurisdiction is "critically important." *Id.* at 556. The juvenile court had "original and exclusive jurisdiction" of the children/defendants so rehabilitation by the juvenile court should be the rule, and punishment as an adult, the exception. *Id.* The reasons for the view that the waiver decision is "critical" include: a juvenile tried by a juvenile court avoids publicity and most of the time his or her record will not be held against him or her later; most of the time a juvenile is not confined with adults, if tried in juvenile court; and a juvenile tried by a juvenile court can only be confined until he is twenty-one years old. *Id.*; *see also* Geis & Binder, *supra* note 19, at 283.

[24] *Kent*, 383 U.S. at 565. The factors the court set out to guide judges in deciding whether to waive juvenile court jurisdiction are:

> 1. The seriousness of the alleged offense to the community and whether the protection of the community requires waiver.
> 2. Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner.
> 3. Whether the alleged offense was against persons or against property, greater weight being given to offenses against persons especially if personal injury resulted.
> 4. The prosecutive merit of the complaint, i.e., whether there is evidence upon which a Grand Jury may be expected to return an indictment (to be determined by consultation with the United States Attorney).
> 5. The desirability of trial and disposition of the entire offense in one court, when the entire offense in one court when the juvenile's associates in the alleged offense are adults who will be charged with a crime in the U.S. District Court for the District of Columbia.
> 6. The sophistication and maturity of the juvenile as determined by consideration of his home, environmental situation, emotional attitude and

that falls within the particular juvenile statute will be waived if it has "prosecutive merit" and if it is "heinous or of an aggravated character, or-even though less serious-if it represent a pattern of repeated offenses."[25] Furthermore, the court held that the public safety should also be considered.[26] However, these factors still leave room for judicial discretion and do not provide objective indicators to guide the judge.

B. Current Waiver Methods

In the 1970s, there was a dramatic rise in crimes committed by juvenile offenders, and the public became frustrated with the juvenile court's focus on rehabilitation.[27] This growing juvenile crime rate led to an increase in transfer rates.[28] From 1971 to 1981 transfers increased nationwide from a mere one percent to greater than five percent of juvenile arrests.[29] Due to the outcry for greater punishment of certain

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pattern of living.

7. The record and previous history of the juvenile, including previous contacts with the Youth Aid Division, other law enforcement agencies, juvenile courts and other jurisdictions, prior periods of probation to this court, or prior commitments to juvenile institutions.

8. The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the juvenile (if he is found to have committed the alleged offense by the use of procedures, services and facilities currently available to the juvenile court.

Id. at 566-67; *see infra* app. A (indicating the states that use the *Kent* criteria or similar factors).

[25] *Kent*, 383 U.S. at 566. The factors listed in the previous footnote are used to determine if the crime falls under this description. *Id.* This statement by the court seems to indicate that they believe these types of crimes are the ones for which society wants retribution.

[26] *Kent*, 383 U.S. at 566. The public may be safer if certain serious juvenile offenders are tried as adults and sentenced as adults.

[27] Donna M. Bishop & Charles E. Frazier, *Transfer of Juveniles to Criminal Court: A Case Study and Analysis of Prosecutorial Waiver*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 281, 282 (1991). There were pleas for the juvenile court to add punishment to its focus. *Id.*

[28] Krisberg et al., *The Watershed of Juvenile Justice Reform*, 32 CRIME & DELINQ. 5 (1986).

[29] Bishop & Frazier, *supra* note 27, at 284. The states have tried to make transfer more efficient by taking some of the discretion out of the transfer discussion. *Id.* They have attempted to do this by making transfer statutory. *Id.*; *see also* Martin L. Forst & Martha-Elin Blomquist, *Cracking Down on Juveniles: The*

youth offenders, states streamlined the waiver process.[30] Currently, three types of waivers are utilized to transfer a case from juvenile court to criminal court. The three types of waivers are: judicial, legislative, and prosecutorial.[31] The most widely used method is still judicial, however, some states use a combination of methods.[32] For example, Mississippi uses both legislative and judicial waiver.

1. Judicial Waiver

The judicial waiver method is not a new practice, as indicated above, but most of today's statutes provide more guidelines.[33] Judicial waiver involves a process whereby a statute empowers a juvenile court judge with the discretion whether to transfer a case or not.[34] The judge must deter-

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Changing Ideology of Youth Corrections, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 323, 337-38 (1991) (supporting punitive policies towards youthful offenders).

[30] Forst & Blomquist, *supra* note 29, at 338. Under either of these three methods, youths charged with certain offenses are automatically tried as adults. Bishop & Frazier, *supra* note 27, at 284. The offenses that usually lead to automatic transfer are capital offenses and serious felonies. *Id. See generally* Ellison, *supra* note 9, at 10-14 (discussing three methods of waiver); Barry C. Feld, *The Juvenile Court Meets the Principle of the Offense: Legislative Changes in Juvenile Waiver Statutes*, 78 U. CRIM. L. & CRIMINOLOGY 471, 489-99 (1987) [hereinafter *Legislative Changes*] (discussing at length waiver process); Barry C. Feld, *The Transformation of the Juvenile Court*, 75 MINN. L. REV. 691, 703-08 (1991) [hereinafter *Transformation*] (addressing judicial waiver and legislative waiver in juvenile sentencing context).

[31] Forst & Blomquist, *supra* note 29, at 338-39. Judicial waiver statutes exist in most states. *Id.*; *see infra* app. A (for analysis of each state's judicial waiver statute).

[32] MISS. CODE ANN. §§ 43-21-151, -157 (1972 & Supp. 1991). The results of Mississippi's waiver statutes in 1988 were that, out of 16,378 children's cases reported by Mississippi Youth Courts, 124 youth's cases were waived to justice or circuit court. Division of Research: College of Business and Industry, Mississippi State University, *Mississippi Statistical Abstract* 578 (1991).

[33] Forst & Blomquist, *supra* note 29, at 338. The addition of guidelines is due to in *Kent*, the public's request for more punitive sanctions of certain juveniles and the disapproval of the unfettered discretion that juvenile judges previously had. *Id.*

[34] *Id.* at 339. The juvenile court judges makes a case-by-case analysis of whether a particular youth can be rehabilitated or whether the youth is a danger to society. *Legislative Changes*, *supra* note 30, at 448. This analysis indicates the individualized decision process and discretion that are present with judicial waiver. *Id.*

mine if a particular individual can be rehabilitated by the juvenile system or if the juvenile has committed an offense that requires the punishment provided by the criminal system.[35] In *Kent*, the United States Supreme Court attempted to curb some of the discretion of juvenile judges in regard to judicial waiver, as discussed above.[36] In addition, the majority of judicial waiver statutes now contain some criteria for the juvenile court judges to follow.[37] However, despite the *Kent* factors and the criteria in most judicial waiver statutes, juvenile judges retain broad discretion concerning the transfer decision.[38] The reason these judges still have broad discretion is because they must apply the *Kent* factors and the statutory criteria, which includes a decision of whether a particular juvenile can be rehabilitated or is too dangerous for the juvenile system to rehabilitate him.[39] Thus, these factors still incorporate a judge's subjective opinion.

An indication of the juvenile judges' broad discretion is the fact that waiver statues are not interpreted consistently.[40] The inconsistency is due to the individualized

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[35] Forst & Blomquist, *supra* note 29, at 339. The critics of individualized sentencing have caused some states to pass two types of legislation. *Legislative Changes*, *supra* note 30, at 489. The first type automatically excludes juveniles who have committed certain specified offenses or who have committed a certain offense and have a prior record of juvenile offenses. *Id.* The second type states that the character of the offense is to be considered more than the nature of the offender. *Id.*

[36] Forst & Blomquist, *supra* note 29, at 338. Although the Court set out these factors to reduce discretion, the Court has not struck waiver legislation that uses broad criteria such as "amenability to treatment," "dangerousness," "protection of the public," "best interests of the public welfare," or the nature of "the youths' family, school and social history." *Id.*

[37] *Id.* at 339. For the most part, the states have simply codified the criteria set out by the Supreme Court in *Kent*. However, some states do not follow any of these criteria and some use a variation of the *Kent* factors. *See infra* app. A.

[38] Forst & Blomquist, *supra* note 29, at 339. Criteria such as "amenability to treatment" and "dangerousness are simply too broad." *Legislative Changes*, *supra* note 30, at 491. These criteria merely reinforce the individualized, "offender-based" nature of the juvenile court system. *Id. See generally* Wizner, *Discretionary Waiver of Juvenile Court Jurisdiction: An Invitation to Procedural Arbitrariness*, 3 CRIM. JUST. ETHICS 41 (1984) (discussion of broad discretion of juvenile judges that remains after *Kent*).

[39] *Legislative Changes*, *supra* note 30, at 491. A long list of factors, such as those in *Kent*, does not give a judge objective guidance. *Id.*

[40] *Id.* at 492. In a study by Fagan, Piper and Forst, seven offense and offend-

nature of the waiver process and the many factors that the judges must consider. In 1978, a nationwide analysis of waiver indicated the extent of the inconsistency.[41] The analysis showed that the rates of waiver, among states that rely on judicial waiver, varied from 13.5 to 0.07 per 10,000 youths at risk.[42] According to this study, Oregon youths were 200 times more likely probability than Montana youths to have their case transferred to criminal court.[43] Furthermore, another factor that causes inconsistency is that a juvenile's race may make a difference in the transfer decision. One study showed that thirty-nine percent of all youths transferred in 1978 were black and other minority youths, and they constituted the majority of juveniles who were transferred in eleven states.[44] However, this study did not account for the seriousness of the offenses and the prior juveniles' records. These youths may have been the ones who committed the more serious crimes or were habitual juvenile defendants.

2. *Legislative or Statutory Waiver*

Another type of waiver is referred to as legislative or statutory waiver or excluded offense provisions which remove judicial discretion. This method of waiver dictates that certain specified offenses go directly to criminal court jurisdiction, even if the offender is a juvenile.[45] Legislative waiver can

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er variables were tested in an attempt to recognize factors that often influence transfer of a case from juvenile to criminal court. *Id.* They indicated that there were no consistent determinants. *Id.* at 493. At one point, Fagan and his colleagues stated, "[e]xcept for a relationship between extensive prior offense history and the transfer decision, none of the identified variables could significantly describe differences between youths who were or were not transferred." *Id.*

[41] *Id.* at 492.

[42] *Id.*

[43] *Id.*

[44] *Legislative Changes*, *supra* note 30, at 492. This study indicated that the youths who were most at risk of transfer were black youths who murder white victims. *Id.* Fagan and his colleagues also noticed a disparity in the transfer of minority offenders as compared to white offenders in general, in their study. *Id.*

[45] *Transformation*, *supra* note 30, at 706. Legislatures can change the jurisdiction of courts because the legislatures create the courts. *Id.* The legislatures must identify their goal and the courts. *Id.* The legislatures must identify their goal and shape the statutory waiver to accomplish this goal. *Id.* at 707 n.74. If

accomplish removal of juveniles from juvenile court in one of two ways. The legislature can either (1) lower the age for criminal court jurisdiction or (2) specify crimes for which the juvenile cannot be tried in juvenile court.[46] One state that has lowered the age of criminal court jurisdiction is Vermont.[47] New York, on the other hand, has specified offenses that cannot be heard in juvenile court.[48] The specified offenses approach is used more often. Several states have legislative waiver statutes, even though, each state may exclude different offenses from juvenile jurisdiction.[49] Many states exclude capital offenses committed by a juvenile who is fourteen years of age and older.[50] Also, some states simply exclude serious

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the legislature wants to accomplish retribution it must provide for automatic transfer of the most serious offenses. *Id.* However, if the legislature wishes to stop juveniles who continue to break the law, even after being punished for one offense, it must provide that offenders with a certain prior record be automatically waived to criminal court. *Id.*

[46] Forst & Blomquist, *supra* note 29, at 340. These statutes are enacted in response to the growing disillusionment for the rehabilitative focus of the juvenile system. Bishop & Frazier, *supra* note 27, at 282 n.9. The statutes attempt to cure the problem with discretion in judicial waiver by taking the judge's decision out of the picture. *See generally* Barry C. Feld, *The Juvenile Court Meets the Principle of the Offense: Punishment, Treatment, and the Difference it Makes*, 68 B.U. L. REV. 821 (1988) (discussing movement toward more punishment focused approach).

[47] Bishop & Frazier, *supra* note 27, at 282-83 n.9.

[48] *Id.* New York's Juvenile Offender Law states that certain serious specified offenses committed by juveniles thirteen years old or older will be automatically waived to criminal court. N.Y. PENAL LAW § 30.00 (McKinney 1987). This law also indicates the amount of time an offender who fits this criteria is to spend in "secure confinement." IRVING SCHWARTZ, NEW YORK SENTENCE CHARTS 21-23 (1992). However, the amount of time prescribed is not as long as the time an adult who committed the same offense would probably receive. Forst & Blomquist, *supra* note 29, at 340.

[49] Ellison, *supra* note 9, at 13. Louisiana's waiver statute provides that the juvenile court has exclusive jurisdiction of a juvenile who is fifteen or sixteen and has committed first degree murder, second degree murder, aggravated rape, or aggravated kidnapping, until either: an indictment for one of these offenses is returned or the juvenile court holds a custody hearing and finds probable cause the juvenile committed one of these offenses. LA. CH. C. ANN. art. 305 (West 1992); *see also* N.Y. PENAL LAW § 30.00 (McKinney 1987).

[50] Ellison, *supra* note 9, at 13; *see* CONN. GEN. STAT. ANN. § 26b-127 (West 1986 & Supp. 1991) (indicating that if juvenile is fourteen years of age or older and has committed murder, he shall be proceeded against in criminal court); *see also* IDAHO CODE § 16-1806A (Supp. 1991) (stating that any person, fourteen or

crimes against persons and property.[51]

Further, legislative waiver may be used in conjunction with judicial waiver.[52] This is because the juvenile court judge usually retains discretion over the crimes that are not excluded from juvenile jurisdiction by the legislature. For example, in Mississippi, a statute provides that the circuit court has original jurisdiction over any offense, committed by a juvenile, which would be punishable by life imprisonment or death if committed by an adult.[53] However, other offenses committed by a juvenile are subject to the original jurisdiction of the juvenile court. The legislative waiver method focuses more on the present crime committed and length of the juveniles prior record to delineate when a juvenile should be tried as an adult.[54] This rationale makes the sentencing more consistent and more comparable to adult sentencing than the individualized method of judicial waiver.[55] An indication of the shift to offense specific consideration from individualized

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older, charged with murder or attempted murder; robbery; rape, assault or battery with intent to commit serious felony; or mayhem, shall be charged by indictment or information as adult).

[51] Ellison, *supra* note 9, at 13; *see* R.I. GEN. LAWS § 14-1-7.1 (Supp. 1991) (indicating that if child is charged with offense that would be felony if committed by adults and child is sixteen or older, after consideration of certain factors, case shall be waived to criminal court); *see also Legislative Changes*, *supra* note 30, at 512-13 (presenting table of different legislative waiver statutes).

[52] Forst & Blomquist, *supra* note 29, at 340. In Georgia, a statute states that the criminal court has original jurisdiction for the offense of burglary, if the offender is at least fifteen and has three prior burglary convictions. GA. CODE ANN. § 15-11-39.1 (1990). However, the juvenile court judge has discretion as to waiver of some other offenses. Forst & Blomquist, *supra* note 29, at 340; *see* MISS. CODE ANN. §§ 43-21-151, -157 (1972 & Supp. 1991) (providing for legislative waiver in some instances and in any remaining instances judicial waiver is used).

[53] MISS. CODE ANN. § 43-21-151 (Supp. 1991). The Mississippi judicial waiver process can begin either by motion of the youth court prosecutor or on the youth court's own motion. MISS. CODE ANN. § 43-21-157 (1972 & Supp. 1991).

[54] *Transformation*, *supra* note 30, at 707. If the maximum sentence that the juvenile court can impose is less than the appropriate sentence required for the commission of a specific offense, that offense is probably one that states automatically waive to criminal court. *Id.* at 706-07. For instance, if a juvenile committed four murders, the maximum sentence in the juvenile courts would not be high enough. *Id.* at 707.

[55] *Id.* Adult sentences must be imposed consistently before the goals of protecting of society, deterring future offenders, and punishment can be met. *Id.*

consideration is demonstrated by the fact that about half of the states emphasize retribution by excluding from juvenile jurisdiction those juveniles who have committed serious offenses.[56] This shift may show lack of confidence in juvenile court judges' ability to make the appropriate decision by considering individual, speculative factors and a belief that some juveniles cannot be rehabilitated.

3. Prosecutorial Waiver

The third type of waiver is prosecutorial. This type of waiver involves a procedure where a local prosecutor makes the decision of whether to prosecute a certain juvenile as an adult or as a juvenile.[57] The prosecutor may file a complaint in juvenile court or seek either an indictment or information in criminal court.[58] Statutes that authorize the prosecutor to make the filing decision usually provide restrictions or guidelines.[59] The guidelines may require that he consider the nature of the offense age of the juvenile, and any prior juvenile record the youth offender may have.[60] If the juvenile has a prior record in juvenile court, that record may indicate that he is not amenable to rehabilitation. Some states combine prosecutorial waiver and judicial waiver.[61] Colorado, for example,

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[56] *Id.* at 708. Some states only exclude juveniles charged with capital crimes but some exclude a long list of crimes. *Id.* Legislative waiver removes judicial discretion entirely, as to the areas the legislative waiver encompasses.

[57] Ellison, *supra* note 9, at 1. This method has been adopted in at least thirteen states, including Arkansas, Florida, Nebraska, and Wyoming. Bishop & Frazier, *supra* note 27, at 285. Usually the prosecutor's decision to file charges in a particular court is not appealable. *Id.*

[58] Ellison, *supra* note 9, at 10. Nebraska's statute states that the county attorney may file in the court of his choice in three instances: "a juvenile of any age alleged to have committed a felony, a juvenile sixteen or seventeen alleged to have committed a misdemeanor or infraction, or a juvenile of any age alleged to have committed a traffic offense." Forst & Blomquist, *supra* note 29, at 341-42; *see* NEB. REV. STAT. § 43-276 (1988) (setting forth certain factors county attorney should consider in making decision about which court to file in).

[59] Bishop & Frazier, *supra* note 27, at 285. Florida does not provide any guidelines in its statute for prosecutorial waiver. *Id.* at 285 n.22. It merely states "when in his judgment and discretion, the public interest requires that adult sanctions be considered or imposed." FLA. STAT. ANN. § 39.047(2)(e)(4) (West Supp. 1991).

[60] Forst & Blomquist, *supra* note 29, at 341.

[61] *Id.* at 342. Utah provides for judicial waiver in the majority of cases, but

enacted a law in 1967 that allowed a prosecutor "to file directly on juveniles sixteen and seventeen years of age charged with an offense that, if committed by an adult, could result in a sentence of life imprisonment or death."[62] Also, Florida passed a law in 1981 allowing the state attorney to file a criminal complaint on sixteen and seventeen year old youths when it is in the public interest that the youth be punished.[63] However, with legislative and prosecutorial waiver statutes, the criminal court judge can send the case back to juvenile court at his discretion.[64]

IV. PUNISHMENT IN JUVENILE COURTS VERSUS PUNISHMENT IN CRIMINAL COURTS

When a judge, prosecutor or legislature is considering waiver of juvenile jurisdiction, the sentencing of the juvenile marks an important distinction between juvenile court and criminal court. The juvenile system's focus for sentencing is mainly either treatment or rehabilitation.[65] In contrast, the focus for sentencing in criminal court is mainly either punishment or retribution.[66] When a juvenile's case is waived to criminal court, it is usually due to a determination by a judge,

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also provides for "direct filing" in some. *Id.*

[62] *Id.*

[63] *Id.* The Florida statute states that if a sixteen or seventeen year old child has been found guilty of murder, sexual battery, armed or strong-armed robbery, aggravated battery, or aggravated assault, and is being charged with a violent crime, the prosecutor shall file an information. FLA. STAT. ANN. § 39.052 (West Supp. 1991).

[64] Forst & Blomquist, *supra* note 29, at 342.

[65] *Legislative Changes*, *supra* note 30, at 500. Despite this focus on rehabilitation, many juveniles who are chronic offenders will continue to be involved in criminal activity even into their twenties. *Id.* Also, youths arrested as juveniles are three to four times more likely to be arrested after they reach adulthood than the youths who are not arrested as juveniles. *Id.* Therefore, these chronic and serious youth offenders must be identified and punished in some way. *Id.* If the maximum sanction the juvenile court can give is not enough, the case can be transferred to criminal court.

[66] *Id.* The sentencing polices in adult court are inconsistent with those in juvenile court. *Id.* This is a result of the failure of the legislature to recognize that youths are not one day immature children and then mature, responsible adults the next, "except as a matter of law." *Id.*

prosecutor, or legislature that the juvenile cannot be rehabilitated. A case is generally waived if the alleged offense is very serious or if the juvenile has a long prior record. However, when a case is transferred to criminal court, the juvenile may be treated more leniently than he would have been treated had the case remained in juvenile court.[67] This phenomenon is called the "leniency gap."[68] The "leniency gap" exists because the juvenile is a first-time offender in criminal court and appears to pale in comparison to hardened adult criminals with long prior records.[69] This lenient treatment of juveniles appears to exist in criminal court, even though the juvenile would not have been a first-time offender in juvenile court or would probably have received the maximum punishment if tried in juvenile court.[70] Youth appears to be a mitigating factor in adult courts, unless the offender is over twenty-one years old.[71] In 1978, a national study, based partially on estimates, showed that twenty-three year olds were two and a half times more likely to be sent to prison after being arrested for robbery than nineteen year olds.[72] Also, other data indi-

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[67] Cary Rudman et al., *Violent Youth in Adult Court: Process and Punishment*, 32 CRIME & DELINQ. 75, 78 (1986) [hereinafter *Violent Youth*]. This often happens even though the juvenile is probably at the peak of his criminal activity. *Legislative Changes*, *supra* note 30, at 500.

[68] *Violent Youth*, *supra* note 67, at 78.

[69] *Legislative Changes*, *supra* note 30, at 501. Even though the criminal activity of older offenders is probably declining, they usually receive maximum sentences for their crimes. *Id.* at 500.

[70] *Id.* at 500-01. Studies indicate that the outcome and punishment of transferred youth is different from state to state. *Violent Youth*, *supra* note 67, at 78.

[71] FRANKLIN E. ZIMRING, CONFRONTING YOUTH CRIME, 59 (1978). These statistics were taken from the Uniform Crime Reports and the National Prisoner Statistics for 1972. *Id.* Current data shows that in 1978, there were 158,394 inmates, 156,783 of whom were adults, while only 1,611 were juveniles who were tried as adults. U.S. Bureau of the Census, *Statistical Abstract of the United States* 193 (11th ed. 1991). In 1988, there were 343,569 inmates, 341,893 of whom were adults, while only 1,738 were juveniles who were tried as adults. *Id.* While the number of adult inmates has increased substantially, the number of juvenile inmates who were tried as adults has not increased significantly. *Id.* In 1979, youths under the age of eighteen comprised eight percent of prison inmates, but in 1986 they only comprised five percent of total inmates. *Id.*

[72] ZIMRING, *supra* note 71, at 61. There appeared to be an eighty percent risk of incarceration for persons aged twenty through twenty-eight who were convicted of armed robbery. *Id.*

cated that only approximately one-third of eighteen year olds who were convicted of burglary actually served time, although over half of older offenders convicted of burglary were imprisoned.[73] In addition, according to a study done in New York City and in Franklin County, Ohio, youths who were tried in adult court had a lower chance of being incarcerated than older offenders.[74] Further, the informal and lenient practices for youths in adult courts were found to be applied to those youths even for about two years after the youth became an adult.[75] During these first two years, age seems to be used as a mitigating factor, even though the punishment is supposed to be closely related to the crime in adult court.[76] Another national study showed that most juveniles transferred to adult court were only fined or placed on probation.[77] Of the juveniles who were imprisoned after transfer to adult court, forty percent of them were sentenced to one year or less.[78] However, these seemingly lenient sentences were due in part to the fact that over one-third of the juveniles transferred were convicted of offenses against property.[79] Furthermore, a study of Oregon courts showed that of the youths who were tried as adults and given a prison sentence, about two-thirds received only one year or less and actually served only an average of eight months.[80] Therefore, these sentences in Oregon were

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[73] *Id.*

[74] *Legislative Changes*, *supra* note 30, at 501. The rate of incarceration in Oregon indicated a lower rate for property crimes (51.5%) than for violent crimes (75.0%). *Id.* at 501 n.132.

[75] *Id.* at 501. In Washington, D.C., the study was found that the seriousness of the youth's offense was the main focus in determining the sentence in adult court, but youth remained a mitigating factor for at least two years after the youth became an adult. *Id.*

[76] *Id.*

[77] *Id.* This again indicates the leniency given to juveniles in adult court. *Id.*

[78] *Id.*

[79] *Legislative Changes*, *supra* note 30, at 501. This is probably due to the fact that there is a greater chance of incarceration for violent offenders.

[80] *Id.* A Utah study indicated that between 1967 and 1980, the majority of transferred juveniles were not charged with violent offenses and most of those convicted were not incarcerated. *Id.* In Mississippi, most of the cases that were transferred in 1988 were burglary charges. *Mississippi Statistical Abstract*, *supra* note 32, at 578-79. The majority of cases transferred in Mississippi were not

about the same as the juvenile would have received in juvenile court.[81]

On the other hand, some studies have shown that a juvenile in criminal court does face more serious consequences in criminal court, when compared to juveniles tried in juvenile court. One study compared the juveniles who had their case waived to criminal court with those who did not.[82] This study considered 138 youths in four cities.[83] The study indicated that it took an average of "2.5 times longer (246 compared to 98 days) for a juvenile to be waived, convicted, and sentenced in criminal court than it did to be considered for transfer, retained, tried, and sentenced in juvenile court."[84] The greater the time delay, the longer it took for the person to begin to be rehabilitated or punished. Additionally, the same study found that the criminal court sentences were more punitive than the sentences in juvenile court.[85] The study showed that, a higher proportion of youths convicted in criminal court received some type of incarceration (prison or jail) than comparable youths sentenced in juvenile court (90% compared to 77%) and the length of the sentence for those incarcerated was approximately five times longer for youths convicted in criminal court.[86] Further, the data in this study showed large differences in the mean length of sentences between juvenile and criminal court. The average difference in murder sentences was 191.8 to 247 months in criminal court as compared to 55.7 months in juvenile court.[87]

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violent crimes. However, there is no information on whether these youths were incarcerated.

[81] *Legislative Changes, supra* note 30, at 501.

[82] *Violent Youth, supra* note 67, at 80-81. This study analyzed the differences in, among other things, the processing time, court outcome, sentencing outcome, and punishment. *Id.*

[83] *Id.* The four cities in the study were Phoenix, Newark, Boston, and also Memphis, to the extent Memphis had data available. *Id.* at 81. Memphis had data available on thirty-nine youths tried and convicted in criminal court. *Id.*

[84] *Id.* at 83. Newark was 4.25 times longer and in Boston almost 3 times longer. *Id.*

[85] *Id.* at 88.

[86] *Legislative Changes, supra* note 30, at 352. Of the 90% that were incarcerated, 72.6% were placed in prison and 17.7% were placed in jail. *Violent Youth,* supra note 67, at 88.

[87] *Violent Youth, supra* note 67, at 89. No data was available for Memphis

A. Egocentrism as a Consideration in the Juvenile Punishment Decision

There seems to be a current trend toward being harsher toward on juvenile offenders.[88] Yet, this policy is inconsistent with society's knowledge about the intellectual, moral, and psychological development of the juvenile.[89] In areas other than crime and punishment, society treats youths as less mature than adults and as if youths have a lower level of judgment than adults.[90] For example, most states have a minimum age requirement before a person can work, drive, quit school, get married, vote, drink alcohol or join the military.[91] The reason for these requirements is that society recognizes that youths go through stages of maturity before they reach adulthood.[92] The Supreme Court has recognized the difference between children and adults stating that, "inexperience, less education, and less intelligence make a teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult."[93] A youth's stage of development has a direct bearing on his ca-

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concerning its juvenile court punishment of youths considered for transfer. *Id.* However, the Memphis criminal courts[87]1296

gave the longest sentences, so similar differences could be expected there. *Id.*

[88] Forst & Blomquist, *supra* note 29, at 369. However, only 124 out of 16,378 juvenile cases in Mississippi were transferred to criminal court in 1988. *Mississippi Statistical Abstract*, *supra* note 32, at 578.

[89] Ellison, *supra* note 9, at 22. Youths go through a maturing process. They do not go directly from being a child to being an adult. *Id.*

[90] Florist & Blomquist, *supra* note 29, at 371. Legal regulation of adolescents is based on the idea that youth involves "semi-autonomy and partial maturity." *Id.*

[91] *Id.* For example, a youth in California may "work part-time at age fifteen, drive a car or leave school at age sixteen, marry, vote or join the military at age eighteen, and drink alcohol at age twenty-one." *Id.* These distinctions exist in most states, even though the specific ages may vary.

[92] *Id.* Society gradually moves youth toward adulthood in most areas. *Id.* However, a juvenile offender may be considered a youth one day and an adult the next day, as is the situation when his case is transferred from juvenile to criminal court. *Id.*

[93] Thompson v. Oklahoma, 487 U.S. 815, 816 (1988). *Thompson* dealt with the issue of maturity and culpability of juveniles. *Id.*

pability of being culpable.[94] Due to a thought process called egocentrism, a youth may see the world from a point of view quite different from an adult's point of view.[95] The egocentric stage of a person's development directly affects that person's capacity for moral culpability, criminal intent, mature judgments and many other mental concepts.[96] Egocentrism is common in youths, but can be noticed in adults.[97] Youths who are egocentric in their thinking see things from a subjective point of view and sometimes may even think their point of view is the only one anybody can have.[98] Each stage of egocentrism involves behavior that can be used to identify it.

The first egocentric stage is called the sensori-motor stage, encompassing the period from birth to two years old.[99] The main characteristic of this stage is a child's lack of ability to recognize the difference between themselves and the larger world.[100] A child in this stage does not realize that an object or person can exist independently of his subjective perceptions.[101]

The second egocentric stage is referred to as the pre-operational stage and encompasses the period from two to six years of age.[102] Toward the end of this stage a child becomes capable of recognizing a difference between symbols and their referents and develops "concrete operations which are internal

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[94] *Legislative Changes*, *supra* note 30, at 522. Punishing someone indicates that person is blameworthy. *Id.* Culpability is "the degree to which he may justly be held to blame for the consequences of the risks of his act." *Id.* This raises the question of whether a youth is capable of being culpable.

[95] Ellison, *supra* note 9, at 22. Youths are mainly concerned with themselves, which is a result of the "physiological metamorphosis" they endure. David Elkind, *Egocentrism in Adolescence*, 38 CHILD DEV. 1025, 1029 (1967).

[96] Forst & Blomquist, *supra* note 29, at 367-68.

[97] Ellison, *supra* note 9, at 22.

[98] *Id.* An egocentric youth assumes that others share in his "pains and pleasures." *Id.*

[99] Elkind, *supra* note 95, at 1026. Toward the end of this period, the child begins to be able to understand that objects exist even when he cannot see them. *Id.*

[100] *Id.*

[101] Ellison, *supra* note 9, at 24.

[102] *Id.* At the beginning of this stage, a child cannot tell the difference between words and their referents. *Id.* He also cannot distinguish between "his self-created play and dream symbols and reality." *Id.*

processes that compare to elementary operations of arithmetic."[103]

The next egocentric stage is called the concrete operational stage and covers the ages between seven and eleven years of age.[104] A main characteristic of this stage is the lack of the ability to tell the difference between thoughts and perceptions. A child in this stage of development interprets data to fit his assumptions and theories, instead of changing his stance when he is wrong.[105]

The final stage is called adolescent egocentrism stage which covers age eleven to adulthood.[106] An adolescent is predominantly concerned with himself,[107] and thinks others have the same "mental preoccupations" as he does.[108] Therefore, the adolescent cannot comprehend the fact that everyone does not share his point of view.[109] A youth at this stage believes himself to be indestructible, and that others do not suffer or have feelings that different from as his.[110] "Only he can suffer with such agonized intensity, or experience such exquisite rapture."[111] As a youth approaches fifteen he begins to outgrow some of these beliefs but still does not think at the same level of maturity of an adult.[112]

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[103] *Id.*

[104] Elkind, *supra* note 95, at 1027. In Mississippi, in 1988, one child out of the 123 transferred to justice or circuit court was age eleven. *Mississippi Statistical Abstract*, *supra* note 32, at 582-83.

[105] Elkind, *supra* note 95, at 1028.

[106] *Id.* at 1029. In 1988, in Mississippi, 122 out of the 123 children whose cases were transferred to justice or circuit court were age fourteen to eighteen. *Mississippi Statistical Abstract*, *supra* note 32, at 583. The states have set different ages as the minimum age of juvenile can be transferred to criminal court by judicial waiver. *See infra* app. A (analysis of various state waiver statutes).

[107] Ellison, *supra* note 9, at 28.

[108] *Id.* An adolescent believes others are preoccupied with his appearance and behavior. *Id.* He anticipates what others will think of him when he is going to be in a social situation. *Id.*

[109] *Id.* at 29. Adolescence distorts a youth's view of himself, his family, religion, and society. *Id.*

[110] *Id.* He feels he is "special or unique." *Id.* He is incapable of understanding that there is any point of view other than his own. *Id.*

[111] *Id.*

[112] Ellison, *supra* note 9, at 29. Once an adolescent develops interpersonal relations, he realizes other people have feelings, just as he does. *Id.*

These mental stages of youth should be considered in the decision of whether to waive a juvenile case to criminal court. It should not be disregarded that a youth does not have control over these stages, and everyone must go through them. If the effect of egocentrism on the juvenile's mental state is not considered at sentencing, then the sentence will not reflect that fact that the juvenile may be less of a threat to peace and order than a more mature offender.[113] If a juvenile's recklessness and indifference to the life of others and to his own life is not recognized, then the sentence will reflect that the juvenile is a greater threat to society than a mature adult offender.[114] The result of this adult standard of punishment is that the youth offender is forced to face the worst of both worlds.[115] He is considered immature in judgment, but is not protected and nurtured as non-delinquent children are.[116] Furthermore, a juvenile must face the obligations and responsibilities of adulthood, while not receiving an adult's freedom and independence.[117] The juvenile who is sentenced as an adult is not able to experience the "semi-responsibility and training for his adult life" that the adults in prison experienced and that his "non-delinquent peers get to experience."[118] Additionally, at sentencing one must keep in mind that a youth may be at one stage mentally, while his

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[113] *Id.* at 32. Youths have a lot of pressure on them. They are faced with a "technologically, socially, and politically" complex world. Forst & Blomquist, *supra* note 29, at 372.

[114] Forst & Blomquist, *supra* note 29, at 372. Expert testimony is necessary to clearly detail the effect egocentrism has on a juvenile's mental state. *Id. See generally* Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187 (1970) (discussing origin of juvenile courts and reforms).

[115] Forst & Blomquist, *supra* note 29, at 373. This incongruity in policy toward youth offenders raises ethical questions concerning their legal treatment. *Id.* The legal system has used the treatment of adult defendants and prisoners as the standard of fairness and equality for juvenile policies. *Id.* However, the equality is limited to the youths bearing burdens equal to the adults. *Id.*

[116] *Id.*

[117] *Id.* Children are treated as immature in most ways. They have to be a certain age to do other adult activities, such as vote. However, to be tried as an adult, the minimum age in most in most states is very low and some states have no minimum age. Mississippi has set the minimum age at thirteen. *See infra* app. A.

[118] Forst & Blomquist, *supra* note 29, at 373.

chronological age represents a different stage.[119] In these situations, the juvenile should be treated as though his chronological age coincides with his mental processes.

B. Possible Class Bias Needs to Be Considered

Another factor to consider in a transfer decision is that there appears to be a "class bias" arising from of the trend toward greater punishment for juveniles.[120] Class bias seems to exist whether or not a juvenile is tried as an adult. Non-delinquent youths are able to attend college where they can acquire greater intellectual, social, and emotional skills, which are necessary for a better life.[121] Yet, while middle and upper class youths can afford higher education, correction facilities are mostly occupied by black and hispanic juveniles from lower class families.[122] These minority and indigent juveniles are receiving their education and job skills in training schools and in some cases prisons. Therefore, due to the fact that training schools are often understaffed and not effective and the fact that prisons are directed toward punishment, not education,a juvenile delinquent's education is probably not on the same level as other youths. The result of this situation is that the juvenile youths are "falling further behind other youths in obtaining the skills and experience necessary for making a successful transition to adult productivity and economic self-sufficiency."[123]

C. Prison Experience Versus Training School Experience

Still another factor in a decision to transfer a juvenile case to adult court should be the difference between the cor-

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[119] *Id.*

[120] Ellison, *supra* note 9, at 32. If a person is at the same mental level as a child, that level should be used as a mitigating factor, just as age is. *Id.*

[121] Forst & Blomquist, *supra* note 29, at 374. This is yet another burden on the youthful offender. *Id.*

[122] *Id.* This helps the non-delinquent children complete their development and gradually assume the responsibilities of adulthood. *Id.*

[123] *Id.* Minority youth comprised fifty percent of the juveniles in public juvenile detention centers in the United States, in 1989. *Id.* at 374 n.158.

rectional experiences of juveniles sentenced to adult prisons and the experiences of those sentenced to training schools by juvenile courts. Due to the trend of providing harsher treatment for juvenile offenders, many states have changed their juvenile court policy from strictly rehabilitation to a mixed rehabilitation/just deserts model predicated on fairness, punishment, and individual responsibility.[124] Many states also recognize public safety as an important factor in delinquency statutes.[125] The new juvenile court law in Washington State lists purposes that include: "[t]o protect the citizenry from criminal behavior, [to] make the juvenile offender accountable for his or her criminal behavior, [and to] provide for punishment commensurate with the age, crime, and criminal history of the juvenile offender."[126] However, the adult prison experience resulting from a transfer to criminal court is still more severe than the training school experience that may result from a juvenile court adjudication.[127] This is because the ultimate objectives of adult prisons are usually focused on retribution and control.[128] Therefore, when a juvenile case is transferred to criminal court, the purpose is to impose harsher consequences than that which can be ordered by the juvenile court system.

A recent study comparing the perceptions of youths in adult prisons to those of youths in juvenile training schools concluded that the prison environment was significantly less positive than that of the training schools regarding different aspects of the environment.[129] One question the youths were

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[124] *Id.*

[125] Martin L. Forst et al., *Indeterminate and Determinate Sentencing of Juvenile Delinquents: A National Survey of Approaches to Commitment and Release Decision Making*, 36(2) JUV. & FAM. CT. J. 1, 2-3 (1985) [hereinafter *Decision Making*]. Some states are adopting sentencing approaches based on the seriousness of the crime and the youth's prior record. *Id.* at 3.

[126] Martin Forst et al., *"Youth in Prisons and Training Schools" Perceptions and Consequences of the Treatment-Custody Dichotomy*, 40(1) JUV. & FAM. CT. J. 1 (1989) [hereinafter *Custody Dichotomy*]. This is one way the states are being harsher on juveniles in juvenile courts. *Id.*

[127] WASH. REV. CODE ANN. § 13.40.010 (West Supp. 1991).

[128] *Custody Dichotomy, supra* note 126, at 2-3.

[129] *Id.* at 3. However, some remedial programs are conducted in prisons. *Id.* But, training schools are directed more toward rehabilitation and counseling and

asked concerned the staff's assistance in providing counseling and remedial services which focused on behavior and social skills designed to prepare them for their return to the community.[130] The results indicated that the staff at training schools were much more helpful.[131] The result is consistent in that the goal of training schools is rehabilitation while the ultimate goals of prisons are punishment and incarceration. To illustrate this difference, counseling services at prisons are usually not a part of the daily routine, but instead are conducted by special staff.[132] However, training schools usually have a line staff that conduct counseling services daily.[133] Also, in training schools, the staff's education, background, and training are usually in the area of counseling and their pay schedule is often based on the help they can provide.[134] Another aspect the youths were polled about was "case management services."[135] This question covered the effectiveness of "individualized social work approaches to managing inmates or residents, and to decision-making regarding participation in services, length of stay, and punishments and awards."[136] The study indicated that no significant difference between the two facilities in the three aspects of the case management performance.[137] The majority of the youths in both facilities had a caseworker assigned to them.[138] Most youths, in pris-

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the staff "teach" and "guide" the youth. *Id.*

[130] *Id.* at 4-5. The youth in prison and those in training school were asked about their perceptions regarding: staff assistance, case management services, treatment services, social climate, and victimization within the institutions. *Id.* at 5. The sample of youth came from Boston, Memphis, Detroit and Newark. *Id.* at 4.

[131] *Id.*

[132] *Id.* at 6. The most drastic difference in results was concerning whether the staff helped the youths improve their relations with others their own age. *Id.*

[133] *Custody Dichotomy, supra* note 126, at 6. This means the services were not constant and probably not very effective. *Id.*

[134] *Id.* Presumably the more the juveniles are exposed to the counseling services, the greater the chance they will be rehabilitated. *Id.*

[135] *Id.* Staff of this caliber and with this motivation would probably be more effective. *Id.*

[136] *Id.* at 5. Youths were asked about the way these functions were performed and about the quality of care. *Id.*

[137] *Id.*

[138] *Custody Dichotomy, supra* note 126, at 7. The ranking of the different as-

on and in training school, had contact with the caseworker within the first week as well as subsequent meetings with her.[139] However, large disparities existed in the results of the studies concerning the quality of the case management services.[140] Overall, the training school youths felt their services were more helpful.[141] Specific treatment and remedial services were also ranked better by the youths in training schools than by the youths in adult prisons.[142] Furthermore, when asked about victimization by staff or other prisoners, more prison youths indicated they had been a victim in some way than did the youths in training school.[143] One possible impact of these distinctions would be that youths in prison are even more violent when they are released. These youths may be more likely to commit other crimes after release, and the crimes may be more violent. Because many juveniles spend more of their developing years in the institutional world, the type of adult they become is influenced by what they experience and learn in prison or training school.[144] This means that those raised in prisons are exposed to a set of rules and norms which include victimization and retaliation. This environment may extinguish all hope that these prison youths from rejoining society and turning away from crime.[145] Judges, prosecutors, and legislators may want to consider whether society wants youths to do some of their growing up in an environment where these youths will likely develop the mentality of the average hardened criminal and ultimately be

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pects were very close to the same for each facility. *Id.* However, the training schools did use performance contracts more often. *Id.*

[139] *Id.* The percentages were very close, 72% in juvenile facilities and 89% in prisons. *Id.*

[140] *Id.*

[141] *Id.* at 7. The youths in training school ranked all six aspects of the quality of case management services higher than the youths in prison. *Id.*

[142] *Id.*

[143] *Custody Dichotomy*, *supra* note 126, at 8. The services in the training schools were ranked higher in three of five areas: "medical care, counseling, and family relations." *Id.* at 8.

[144] *Id.* at 10. The largest difference here was the fact that only 1.7% of the youths in training schools said someone had sexually attacked or raped them, but 8.6% of youths in prison said someone had attacked or raped them. *Id.*

[145] *Id.* at 11.

a curse to society.[146] Although transfer decreases risks to society during the time the juvenile is incarcerated, when these youths return to the street, the question is whether a youth who spent a shorter time in a training school under treatment is less of a risk to society than a youth who spent many years in a prison environment.

The training school approach to rehabilitation is superior because it considers the mental development of the youth. Nevertheless, training schools must also focus on control and punishment. An institution that can provide a balance of rehabilitation, control and punishment would be the best solution to the juvenile problem. Creating an environment along the lines of traditional military discipline might best produce this balance. Perhaps, rather than deciding between prison and training school, the better idea would be to establish an institution that is between the two extremes.

V. CAPITAL PUNISHMENT OF JUVENILES

> Excessive bail should not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.[147]

Over the years, courts interpreted the Eighth Amendment as an indication that capital punishment should not offend the "dignity of man."[148] Courts and legislatures determine whether an act "offends the dignity of man" by looking to the "evolving standards of decency that mark the progress of a maturing society."[149] In 1975, in *Gregg v. Georgia*,[150] the United States Supreme Court found that the death penalty did not necessarily violate the Eighth Amendment.[151] Later, in *Eddings v. Oklahoma*,[152] the Supreme Court was asked to decide whether the Constitution prohibits the death penalty as a

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[146] *Id.*
[147] U.S. CONST. amend. VIII.
[148] Trop v. Dulles, 356 U.S. 86, 89 (1958).
[149] *Id.*
[150] 428 U.S. 153 (1976).
[151] *Gregg*, 428 U.S. at 169.
[152] 455 U.S. 104 (1982).

punishment for juveniles.[153] However, the Court disposed of the case without giving an answer to this question.[154] In 1988, in *Thompson v. Oklahoma*,[155] the Court held that capital punishment for juveniles who were fifteen years of age or younger violated the Eighth and Fourteenth Amendments.[156] However, this decision did not cover all juveniles. Then finally, in the combined decision of *Stanford v. Kentucky*[157] and *Wilkins v. Missouri*,[158] the Supreme Court found that the death penalty, in regard to sixteen and seventeen year old juveniles, did not violate the United States Constitution. Stanford was seventeen years old when he raped, sodomized and shot an employee at a gas station, and Wilkins was sixteen when he stabbed to death an employee at a liquor store.[159] Both of these youths received the death penalty which in each case, the sentence was upheld by the Supreme Court.[160] The Court held that capital punishment of juveniles sixteen or seventeen years of age was not an act that was considered cruel and unusual at the time the Bill of Rights was adopted.[161] At common law, anyone over the age of seven could receive the death penalty.[162] At least 281 juveniles under the age of eighteen years and approximately 126 juveniles under the age of seventeen have been executed in the United States.[163]

The court in *Stanford* also considered the evolving stan-

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[153] *Eddings*, 455 U.S. at 105.

[154] *Id.* at 106.

[155] 487 U.S. 815, 837 (1988).

[156] *Thompson*, 487 U.S. at 837. This case left open the question whether the death penalty was constitutional for juveniles sixteen and seventeen years old. *Id.*

[157] 492 U.S. 361 (1989).

[158] 492 U.S. 361 (1989).

[159] Nancy A. Inskeep, *Death's Foreclosure: Capital Punishment of 16- and 17-Year-Olds Under* Stanford v. Kentucky, 18 N. KY. L. REV. 81, 83-85 (1990). (citing Stanford v. Kentucky, 492 U.S. 361 (1989)).

[160] Inskeep, *supra* note 159, at 83. The court stated that there was no hope of rehabilitating these youths. *Id.*

[161] Mullin, *supra* note 2, at 165.

[162] There was a presumption that a youth between the ages of seven and fourteen could not form criminal intent. *Id.* However, this presumption was rebuttable. *Id.*

[163] *Id.*

dards of decency in society.[164] Justice Scalia, in *Stanford*, pointed out that of the thirty-six states that allow capital punishment, twenty-one states allow for the penalty to be appealed solely because of the age of the juvenile.[165] The Court stated that these numbers did not indicate a "national consensus" that the death penalty could not be constitutionally imposed upon persons sixteen or seventeen years old.[166] The Court then considered other indicators of public opinion.[167] The Court found that other state and federal legislation protecting juveniles due to their immaturity was irrelevant.[168] Nevertheless, there is a trend in state legislation which shows a movement away from the death penalty for juveniles.[169] In 1984, thirty-one states allowed juveniles to receive the death penalty.[170] Presently, only twenty-five states provide for capital punishment of juveniles.[171] Fairly recently, eight states changed their capital punishment statute in some way.[172] These states have either raised the minimum age for capital punishment to seventeen or eighteen or banned it entirely.[173] Further, juries

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[164] Inskeep, *supra* note 159, at 88. Some of the factors considered in determining society's viewpoint are: history, judicial and legislative precedents, current legislation, juries' and prosecutors' views, and public, professional, and international opinions. *Id.*

[165] *Id.*

[166] *Id.* at 89. However, Justice Brennan, in his dissent, pointed out that fourteen states forbid capital punishment altogether, thirty states would not allow the death penalty for sixteen year olds and twenty-seven would not allow it for seventeen year olds. *Id.*

[167] *Id.* at 90-91.

[168] *Id.* at 90. In the Court's opinion, recent drug legislation that did not allow capital punishment for offenders under eighteen did not indicate that society was against the death penalty being imposed on juveniles under any circumstances. *Id.*

[169] Steven M. Scott, *Evolving Standards of Decency and the Death Penalty for Juvenile Offenders: The Contradiction Presented by Stanford*, Stanford v. Kentucky, 19 CAP. U. L. REV. 851, 859 (1990) (citing Stanford v. Kentucky, 492 U.S. 361 (1989)).

[170] Scott, *supra* note 169, at 859.

[171] *Id.* States that have changed their stance are Colorado, Tennessee, Oregon, Maryland, New Jersey and New Hampshire. *Id.* at 859 n.57.

[172] *Id.* at 860.

[173] *Id.* Six states raised their minimum age to eighteen; one state raised the minimum age to seventeen, and one banned it entirely. *Id.*

seem to be reluctant to impose the death penalty,[174] and consequently, the number of juveniles who received the death penalty in the past few years has declined.[175] However, the Supreme Court did not find this data persuasive.[176] Furthermore, the Court did not think the Justices' substantive opinions should matter, and found public opinion polls and professional associations provided an "uncertain foundation" upon which to base constitutional law.[177] Therefore, the United States Supreme Court found that capital punishment did not go against society's standards of decency in regard to juveniles that are age sixteen or seventeen.

The goals of the death penalty are retribution and deterrence.[178] However, due to adolescent egocentrism, it is doubtful that the death penalty serves as a deterrent.[179] Juveniles have an attitude that they are indestructible, and they are only worried about their own wants, needs, and feelings.[180] Social scientists feel that juveniles live for today and are not worried about death at all, so death is not a deterrent.[181] Further, society wants retribution for knowing and willful murders.[182] Since there is scientific evidence that juveniles do not understand the ramifications of their acts, the goal of retribution may not make sense in the context of juveniles.[183] Hence, the goals behind capital punishment may not be accomplished when applied to juveniles. Juveniles are just not at the same

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[174] Inskeep, *supra* note 159, at 91.

[175] Scott, *supra* note 169, at 860. In 1982, eleven juveniles received the death penalty; only three received it in 1985, and seven in 1986. *Id.*

[176] Inskeep, *supra* note 159, at 91. The Court stated that "it is not only probable but overwhelmingly probable that the very considerations which induce petitioners and their supporters to believe that death should never be imposed on offenders under eighteen cause prosecutors and juries to believe that it should rarely be imposed." *Id.* (quoting Stanford v. Kentucky, 492 U.S. 361, 372 (1989)).

[177] Inskeep, *supra* note 159, at 91.

[178] Mullin, *supra* note 2, at 186. In one case the Supreme Court indicated that the death penalty could be "justified in terms of two principal social purposes: retribution and deterrence." *Id.*

[179] Scott, *supra* note 169, at 863.

[180] *Id.*

[181] *Id.*

[182] *Id.* at 864.

[183] *Id.* at 865.

level of maturity as adults. Thus, the question is: Whether juveniles are mature and responsible enough to be put to death for their wrongful acts?

VI. CONCLUSION

At common law, there was a rebuttable presumption that juveniles under the age of fourteen were not capable of forming criminal intent.[184] At some point though, juvenile reforms spread across the United States. Eventually, a method of simply waiving certain juvenile cases to criminal court was developed. Historically, the waiver decision rested totally on the juvenile judge,[185] with that judge having complete discretion.[186] However, because the waiver decisions were not consistent, society began to question the judges' capability of making the right decision.[187] Therefore, the legislatures tried to reform the process.[188] Today, the waiver of a juvenile case to criminal court can be accomplished in one of three ways: judicial waiver, legislative waiver, or prosecutorial waiver.[189] Most states have some form of judicial waiver, but not every state uses the other two methods.[190] All three methods are governed by statute in most states.[191] In most instances, the statutes provide guidelines to make the waiver process more consistent from case to case.[192] In addition, several important factors enter into the waiver decision. The first factor is the difference in the punishment a juvenile is likely to receive in criminal court as opposed to juvenile court.[193] Some studies show that the juvenile may actually receive more lenient treatment in criminal court than the juvenile would in juvenile

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[184] *See supra* note 1 and accompanying text.
[185] *See supra* note 19 and accompanying text.
[186] *Id.*
[187] *See supra* note 33 and accompanying text.
[188] *Id.*
[189] *See supra* note 29 and accompanying text.
[190] *See supra* note 30 and accompanying text.
[191] *See supra* note 28 and accompanying text.
[192] *Id.*
[193] *See supra* notes 66-68 and accompanying text.

court.[194] This is due to the fact that the juvenile may be a first-time offender in criminal court, but he may have a long prior record in juvenile court.[195] On the other hand, other studies show that a juvenile will receive harsher punishment in criminal court.[196] The second consideration is the effect that egocentrism has on a juvenile's mental processes.[197] A youth goes through several stages of development before becoming an adult.[198] As a juvenile is not as mature as an adult,[199] youths tend to think only of themselves.[200] They are only conscious of their own wants, needs, and beliefs.[201] Further, since many youths are not afraid of death,[202] this should be considered in the waiver decision because of the direct bearing on the youth's capability of being culpable. A third factor that should be considered is the possibility of "class bias" due to the fact that a greater number of juveniles are members of minority groups from lower class families.[203] The effort to try to rehabilitate and educate these youths is important, so that they will not fall even further behind middle and upper class youths. Another important consideration in the decision of whether to waive a juvenile case to criminal court is the difference in the correctional experience in prison as compared to juvenile training school.[204] Juvenile training schools focus mostly on rehabilitation and making the juveniles better citizens when they are released.[205] Prisons focus on punishment and control.[206] Furthermore, the possibility that the youth may receive capital punishment in criminal court should be considered.[207] Some youths commit very serious crimes, and society wants retribu-

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194 *See supra* note 68 and accompanying text.
195 *See supra* note 70 and accompanying text.
196 *See supra* notes 83-88 and accompanying text.
197 *See supra* notes 89-120 and accompanying text.
198 *Id.*
199 *Id.*
200 *See supra* note 96 and accompanying text.
201 *See supra* note 99 and accompanying text.
202 *See supra* note 110 and accompanying text.
203 *See supra* notes 121-24 and accompanying text.
204 *See supra* notes 125-47 and accompanying text.
205 *See supra* note 66 and accompanying text.
206 *See supra* note 129 and accompanying text.
207 *See supra* notes 156-57 and accompanying text.

tion. However, the fact that youths are not fully in control of their thought processes, due to egocentrism, should have an impact on the capital punishment decision.[208]

The waiver decision is an important one because juvenile crime is a reality that must be dealt with effectively. Many juveniles can probably be rehabilitated because they are still developing. Nevertheless, after all the relevant factors have been considered, if a juvenile just does not appear amenable to rehabilitation and he has committed a very serious crime, waiver of his case to criminal court may be appropriate. However, an idea that should be considered is combining the goals of prisons and those of training schools and establishing an institution that can achieve all of these goals and make juveniles become respectable members of society when they are released.

Katherine L. Evans

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[208] *See supra* notes 176-78 and accompanying text.

Appendix A

Judicial Waiver Statutes

	AGE LIMIT FOR JUVENILE COURT JURISDICTION	MINIMUM AGE FOR PROSECUTION AS AN ADULT	USE *KENT* CRITERIA?*	MINIMUM OFFENSE FOR ADULT PROSECUTION**
Ala. (§ 12-15-34)	18	14	Yes	Felony
Alaska (§ 47.10.060)	18	None	Yes	Any Offense
Ariz. (Juv. Ct. R. 12, 13, 14)	18	None	Yes	Any Offense
Ark. (§ 9-27-318)	18	14	Yes	If 14 or 15, Capital Murder, 1st or 2d Degree Murder, 1st Degree Kidnapping, Aggravated Robbery, Rape, or 1st Degree Battery. If 16, any felony.
Cal. (§ 707(a) (b) (Supp. 1991))	18	16	Yes	Any Offense
Colo. (§ 19-2-806, (Supp. 1991))	18	14	Yes	Felony
Conn. (§§ 46b-126, -127)	16	14	Yes	Class A, B or C Felony if prior serious Juvenile Offense; 1st Degree Murder, Rape, Kidnapping.

	AGE LIMIT FOR JUVENILE COURT JURISDICTION	MIN. AGE FOR PROSECUTION AS ADULT	USE *KENT* CRITERIA?*	MIN. OFFENSE FOR ADULT PROSECUTION**
Del. (§§ 938, 921)	18	16	Yes	1st Degree Murder, Rape, Kidnapping
D.C. (§ 16-2307(a))	18	15	Yes	Felony
Fla. (§ 39.02)	18	14	Yes	Any Offense
Ga. (§ 15-11-39, -39.1)	17	13	Yes	Any Offense if punishable by life imprisonment or death. If 15 or older, any offense.
Haw. (§ 571-22)	18	16	Yes	Felony
Idaho (§ 16-806)	18	14	Yes	Any Crime
Ill. (§ 805-4)	17	13	Yes	Any Crime
Ind. (§ 31-6-2-4)	18	16	Yes	Felony; if 14, Heinous or Aggravated Crime, if prior delinquent acts; if 10, Murder.
Iowa (§ 232.45)	18	14	Yes	Any Crime
Kan. (§ 38-1636)	18	16	Yes	Any Offense; if 14, Class A or B Felony
Ky. (§ 635.020)	18	14	Yes	Capital Offense, Class A or B Felony

	AGE LIMIT FOR JUVENILE COURT JURISDICTION	MIN. AGE FOR PROSECUTION AS ADULT	USE *KENT* CRITERIA?*	MIN. OFFENSE FOR ADULT PROSECUTION**
La. (tit. VIII ch. 11 art. 857 & ch. 4 art. 305)	17	15	Yes	1st, 2d Degree Murder, Aggravated Rape, Burglary, Robbery, Kidnapping
Me. (tit. 15 § 3101)	18	None	Yes	Murder, Class A or B Felony
Md. (§ 3-817)	18	15	Yes	Any Offense; Under 15, Life Imprisonment or Death
Mass. (ch. 119, § 61)	17	14	Yes	If Punishable by Imprisonment in state prison and offender has Prior Record or Committed Serious Bodily Harm
Mich. (§ 712A.4)	17	15	Yes	Felony
Minn. (§ 260.125)	18	14		Any Offense
Miss. (§ 43-21-105)	18	13	Yes	Any Offense
Mo. (§ 211.071)	17	14	Yes	Felony

	AGE LIMIT FOR JUVENILE COURT JURISDICTION	MIN. AGE FOR PROSECUTION AS ADULT	USE *KENT* CRITERIA?*	MIN. OFFENSE FOR ADULT PROSECUTION**
Mont. (§ 41-5-206)	18	12	Yes	Rape, Murder, Manslaughter or the Attempt
Neb. (§ 43-245, -247)	18	None		Felony
Nev. (§ 62.080)	18	16		Felony
N.H. (§ 169-B:24)	18	None	Yes	Felony
N.J. (§ 2A:4A-26)	18	14		Homicide, Robbery, Rape, Assault, Kidnapping, Arson
N.Y.***				
N.M. (§ 32-1-29; -30)	18	15	Yes	Murder
N.C. (§ 7A-608)	16	14		Felony
N.D. (§ 27-20-34)	18	14	Yes	Act Involving Serious Bodily Harm or Threat
Ohio (§ 2151.26)	18	15	Yes	Felony
Okla. (tit. 10 § 1112)	18	None	Yes	Felony
Or. (§ 419.533)	18	15	Yes	Murder, Aggravated A, B, & Some C Felonies

	AGE LIMIT FOR JUVENILE COURT JURISDICTION	MIN. AGE FOR PROSECUTION AS ADULT	USE *KENT* CRITERIA?*	MIN. OFFENSE FOR ADULT PROSECUTION**
Pa. (42 § 6355)	18	14	Yes	Felony
R.I. (§§ 14-1-7, 14-1-7.1)	18	16	Yes	Felony
S.C. (§ 20-7-430)	17	14		If juvenile has two prior adjudications for listed crimes and is presently charged with a like crime; If 16 or older, Any Offense
S.D. (§ 26-11-4)	18	10	Yes	Any Offense
Tenn. (§ 37-1-134)	18	14	Yes	Murder, Rape, Aggravated Robbery, Kidnapping; If 16 or older, Any Offense
Tex. (§ 54.02)	17	15	Yes	Felony
Utah (§ 78-3a-25)	18	14	Yes	Felony
Vt. (tit. 33 §§ 5502, 5506)	18	10	Yes	Listed Felonies
Va. (§ 16.1-269)	18	15	Yes	If Punishable by Imprisonment

	AGE LIMIT FOR JUVENILE COURT JURISDICTION	MIN. AGE FOR PROSECUTION AS ADULT	USE *KENT* CRITERIA?*	MIN. OFFENSE FOR ADULT PROSECUTION**
Wash. (§ 13.40.110)	18	15	Yes	Class A Felony or an Attempt, Solicitation, or Conspiracy for Class A Felony
W. Va. (§ 49-5-10)	18	None		Listed Felonies
Wis. (§§ 48.18, 48.02)	18	14	Yes	1st or 2d Degree Murder; If 16 or older, any Offense
Wyo. (§§ 14-6-237, 14-1-101)	19	None	Yes	Any Offense

* These states use the *Kent* factors, similar factors, or a combination.

** These are the minimum ages in most cases; there may be other specified offenses for other ages.

*** In New York, juvenile court jurisdiction ends at age sixteen. N.Y. PENAL LAW § 40.00(2) (McKinney 1987). At the time this paper was written, no judicial waiver statute could be found for New York. However, New York has enacted a statute that provides that a person who is thirteen, fourteen or fifteen and commits certain enumerated crimes is criminally responsible. N.Y. PENAL LAW § 30.00(2) (McKinney 1987). Furthermore, the statute specifically provides that lack of criminal responsibility because of infancy is a defense. N.Y. PENAL LAW § 30.00(3) (McKinney 1987).

A CALL TO SECURE RELIGIOUS EXERCISE UNDER THE MISSISSIPPI CONSTITUTION

> Man has long sought to live according to his religious beliefs and to be let alone in the process. So living we yearn to be free of societal opprobrium and state interference. The lesson of history is that, because we are diverse, the existence of the former will lead to the latter . . . [1]

I. FREEDOM OF RELIGION UNDER THE FEDERAL CONSTITUTION

A. General Framework

The freedom of religion under the United States Constitution proceeds from two distinct clauses of the First Amendment: the Establishment Clause and the Free Exercise Clause. The well-known mandate of these clauses is that "[C]ongress shall make no law respecting an establishment of religion, or of prohibiting the free exercise thereof."[2]

The Free Exercise Clause renders unconstitutional any law whose purpose "is to impede the observance of one or all religions"[3] or "to discriminate invidiously between religions."[4] Similarly, laws which attempt to regulate "beliefs" are also forbidden under the Free Exercise Clause.[5]

Justice Black clearly stated the prohibitions of the establishment clause in the landmark case of *Everson v. Board of Education*:[6]

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal

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[1] *In re Brown*, 478 So. 2d 1033, 1035 (Miss. 1985) (Robertson, J.).
[2] U.S. CONST. amend. I.
[3] Braunfeld v. Brown, 366 U.S. 599, 607 (1961).
[4] *Id.*
[5] Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).
[6] 330 U.S. 1 (1947).

> Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, from church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."[7]

Almost invariably, the Establishment Clause cases heard by the Supreme Court address state government policies, and therefore depend upon a theory of Fourteenth Amendment incorporation of the Bill of Rights.[8] The first case which determined that the Establishment Clause would be applicable to the states was *Everson v. Board of Education*.[9] Subsequently,

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[7] *Everson*, 330 U.S. at 15-16 (quoting in part Reynolds v. United States, 98 U.S. 145, 164 (1878)). The Court basically summarized this doctrine into a three-pronged test for evaluating whether a governmental action passes muster under the Establishment Clause in Lemon v. Kurtzman, 403 U.S. 602 (1971). "First, the statute must have a secular legislative purpose; second, it's principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an 'excessive government entanglement with religion'." *Lemon*, 403 U.S. at 612-13 (citations omitted); *see, e.g.*, Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. 573, 623 (1989) (court used three-prong test for violation of Establishment Clause to find display of creche in courthouse unconstitutional); Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 710-11 (1985) (holding Connecticut statute violative of Establishment Clause for requiring private employers to grant workers day-off on whatever day individual employee observed Sabbath).

[8] Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1115, 1142 (1988). Professor Conkle has stated that, more precisely, these cases depend on a premise that the Establishment Clause prohibition on federal action should be applied to the states as though it reflected a general principle concerning the proper relationship of religion and government. *Id.* at 1142-43.

[9] *Everson*, 330 U.S. at 8, 14-15 (majority opinion); *id.* at 29 (Rutledge, J., dissenting). Yet, this finding of incorporation was "little more than a bare asser-

other cases have endorsed this same position.[10] However, in *Wallace v. Jaffree*[11] the Supreme Court was forced to reverse the district court which had ruled against this well settled precedent, and held that constitutional restraints against the federal government were not applicable against the states in establishing church state relations.[12] In reversing the district court, the Supreme Court relied on precedent to reassert the doctrine of incorporation without any significant effort at refuting the district court's historical argument.[13] Accordingly, any action taken by a state must pass muster under the Establishment Clause. Therefore, the only real limit on the Supreme Court's authority to enforce constitutional restraints against legislative or executive actions by a state is if the state's exercise of power would have been denied to the federal government by the framers and ratifiers of the Establishment Clause.[14]

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tion," as the Court did not engage in any significant analysis of this issue. Conkle, *supra* note 8, at 1124 n.42.

[10] *See, e.g.*, Abington Sch. Dist. v. Schempp, 374 U.S. 203, 215-17 (1963) (stating that religion clauses of First Amendment are fully applicable to states).

[11] 472 U.S. 38 (1985).

[12] Jaffree v. Board of Sch. Comm'rs, 554 F. Supp. 1104, 1118-26 (S.D. Ala. 1983), *rev'd sub nom.*, Jaffree v. Wallace, 705 F.2d 1526 (11th Cir. 1983), *aff'd*, 472 U.S. 38 (1985).

[13] Conkle, *supra* note 8, at 1137 n.120. The district court relied heavily on the work of Professor Charles Fairman. *Jaffree*, 554 F. Supp. at 1119-28 (citing Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949)). Professor Conkle's well-reasoned article supports the district court in *Jaffree*, at least in regard to incorporation by the states of the Establishment Clause. Conkle, *supra* note 8, at 1137 n.120. His best point in support of the position that the Fourteenth Amendment, as originally understood, did not incorporate the Establishment Clause for application to the states is the "Blaine Amendment" - a resolution considered only eight years after the Fourteen Amendment had been ratified. *Id.* at 1137-38. The Blaine Amendment would have provided that "[n]o state shall make any law respecting an establishment of religion or prohibiting the free exercise thereof." *Id.* at 1137 n.120 (quoting H.R.J. Res. 1, 44th Cong., 1st Sess., 4 CONG. REC. 205 (1875)). Obviously, Congress rejected the Blaine Amendment and the legislative history surrounding it is abounding with evidence that it was not rejected because it was thought to be superfluous. *Id.* at 1138 n.124 (citing 4 CONG. REC. 5561 (1876)). This position taken by the Supreme Court in *Jaffree* seems incongruous with its decision in Marsh v. Chambers, 463 U.S. 783 (1983), where the Court relied on the original understanding of the Constitution to uphold the constitutionality of legislative prayer. *Chambers*, 463 U.S. at 790-91.

[14] Conkle, *supra* note 8, at 1143.

B. Conflict Between the Clauses

Since any state action must comply with the mandates of the Federal Establishment Clause, it is worth noting that it has been widely recognized that there is a tension between the two religious clauses.[15] Justice Brennan stated that "[t]he inclusion of both restraints upon the power of Congress to legislate concerning religious matters shows unmistakably that the framers of the First Amendment were not content to rest the protection of religious liberty exclusively upon either clause."[16]

Usually, an issue under the Free Exercise Clause arises when a general government regulation, undertaken for genuinely secular purposes, either penalizes or burdens conduct that is dictated by some religious belief.[17] Alternatively, this issue frequently arises where a regulation of secular purpose requires conduct that is forbidden by the claimant's religion.[18] In the above situations, the Court has employed a balancing process of the respective interests to determine if the government must accommodate the religious interest by providing an exemption from the general rule.

For example, *Sherbert v. Verner*[19] held that the Free Exercise Clause was violated when the State refused to grant unemployment compensation benefits to a claimant who was disqualified benefits because of her refusal, based on religious beliefs, to accept employment which would require her to work on Saturday.[20] In determining whether the eligibility provisions of the state were in accordance with the Free Exercise Clause, the Supreme Court stated that showing a mere rational

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[15] *See generally*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-2 (1978) (discussing conflict between religion clauses). The Supreme Court has stated, "[Either clause], if expanded to a logical extreme, would tend to clash with the other." Walz v. Tax Comm'n, 397 U.S. 664, 668-69 (1970).

[16] Abington Sch. Dist. v. Schempp, 374 U.S. 203, 232 (1963).

[17] Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT L. REV. 673, 674 (1980).

[18] *Id.*

[19] 374 U.S. 398 (1963).

[20] *Sherbert*, 374 U.S. at 399-400.

relationship to a state interest would not justify the substantial infringement of the claimant's free exercise right.[21] In finding no compelling state interest, the court granted an exemption from this generally applicable law.[22]

Another case involving conflicting interests between a governmental regulation and the free exercise of religion was *Wisconsin v. Yoder*.[23] Here, it was held that the Amish were entitled to an exception from the State's compulsory school attendance statutes.[24] In balancing the interests involved, the *Yoder* Court stated that only those interests of the highest state order and those not otherwise served can outweigh legitimate claims to the free exercise of religion.[25]

Thus, the Establishment Clause forbids action whose purpose is to aid religion, but, on the other hand, the Free Exercise Clause may require government action to accommodate religion.[26]

II. Narrowing of the Free Exercise of Religion under the United States Constitution

In noting the modern Court's view of a tension between the Free Exercise and Establishment Clauses, Justice Rehnquist remarked, "By broadly construing both clauses, the Court has constantly narrowed the channel between the Scylla and Charybdis through which any state or federal action must pass in order to survive constitutional scrutiny."[27]

Recently, the free exercise of religion under the United States Constitution has again been narrowed by the Supreme Court in *Employment Division, Department of Human Resources v. Smith*.[28] In *Smith*, two employees at a drug rehabilitation clinic were fired and their applications for unemployment compensation were denied by the State of Oregon for "miscon-

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[21] *Id.* at 406.
[22] *Id.*
[23] 406 U.S. 205 (1972).
[24] *Yoder*, 406 U.S. at 236.
[25] *Id.* at 215.
[26] Choper, *supra* note 17, at 674.
[27] Thomas v. Review Bd., Ind. Employ. Sec. Div., 450 U.S. 707, 721 (1981).
[28] 110 S. Ct. 1595 (1990).

duct" when they ingested a hallucinogenic drug known as peyote.[29] The two employees stated that the taking of this drug was for religiously motivated purposes at a ceremony of their Native American Church.[30] On remand from the United States Supreme Court, the Oregon Supreme Court found that since the Oregon statute made no exception for the sacramental use of peyote then the use in this instance fell within the state prohibition.[31] However, the Oregon Supreme Court ruled that the employees could not be denied unemployment benefits when it held that the statute was invalid under the Free Exercise Clause.[32] Upon granting of certiorari to the United States Supreme Court, the briefs and arguments of both sides focused entirely on whether the state's interest in controlling drug use was sufficient to meet the compelling interest test in order to overcome the free exercise rights of the two employees.[33] In deciding the action, the Court discarded the "compelling interest" test for these free exercise claimants which, in effect, narrowly limited the free exercise of religion.[34]

The *Smith* Court stated that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action only where there is a hybrid constitutional claim, i.e., a free exercise claim connected with other constitutional protections, such as a communicative activity or a parental right.[35] The Court also tried to distinguish the instant factual scenario by stating that the *Sherbert* test only applied to the denial of unemployment compensation. The Court recognized that in other cases where it has "purported" to apply the

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[29] Peyotism is an ancient sacramental practice; the use of Peyote is unpleasant and the drug is not part of drug trafficking. Michael W. McConnell, *Free Exercising Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1113 (1990) [hereinafter McConnell, *Revisionism*].

[30] *Smith*, 110 S. Ct. at 1598.

[31] *Id.*

[32] *Id.*

[33] McConnell, *Revisionism*, *supra* note 29, at 1113. The litigants focused on the compelling interest test because of Supreme Court precedent such as *Sherbert* and *Yoder*. *See supra* notes 19-25 and accompanying text.

[34] *Smith*, 110 S. Ct. at 1602.

[35] *Id.* at 1601.

Sherbert test, it has always been satisfied.[36] The Court expressed that "[e]ven if it were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field [that it] would not apply it to require exemptions from a generally applicable criminal law."[37]

In respect to applying the compelling interest test to free exercise claims, the Court reasoned that rather than produce equality of treatment and unrestricted flow of contending speech, as in other fields of constitutional law, it would produce a "constitutional anomaly" by giving a private right to ignore generally applicable laws.[38] Further, the Court balked at the idea of judges attempting to determine the "centrality" of religious beliefs before applying a compelling interest test in the free exercise field.[39]

The dissent in *Smith* criticized the Court for summarily dismissing the compelling interest test in this context as a "constitutional anomaly,"[40] and termed the majority's view "distorted" for apparently concluding that strict scrutiny of a state law burdening the free exercise of religion is a "luxury" that a well-ordered society cannot afford.[41] The dissent noted the seriousness of the consequences of repressing a minority religion as an "unavoidable consequence of democratic government" (in reference to the fact that the Oregon legislature did not provide an exemption for the sacramental use of peyote).[42]

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[36] *Id.* at 1602.

[37] *Id.* at 1603.

[38] *Id.* at 1604. For a criticism of this point, see McConnell, *Revisionism*, *supra* note 29, at 1132-41.

[39] *Smith*, 110 S. Ct. at 1604.

[40] *Id.* at 1615-16 (Blackmon, J., dissenting).

[41] *Id.* at 1616 (Blackmon, J., dissenting).

[42] *Id.* (Blackmon, J., dissenting). The majority had stated:

> Values that are protected against interference through enshrinement in the Bill of Rights are not thereby banished from the political process. Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well . . . . [This system of democratic government] must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social

The dissent also criticized the majority for failing to articulate in precise terms the state interest involved.[43] It was not the state's broad interest in fighting the critical "war on drugs" that had to be weighed against the respondents' claim, but instead it was the state's narrow interest in refusing to make an exception for religious, ceremonial use of peyote.[44] Finally, the dissent stated that the Court should not turn a blind eye to the severe impact of a state's restrictions on the adherents of a minority religion and then try to justify it in the name of refraining from the analysis of whether a particular practice is "central" to the religion.[45] Nevertheless, the effect on future Free Exercise cases due to the decision in *Smith* appears to be that the constitutional free exercise protection of granting an exception for sincere religious belief no longer exists.[46]

Another disturbing issue that arose out of the *Smith* case concerns the fact that the Court reiterated "formal neutrality" toward religion by holding that a state is not prohibiting the free exercise of religion if a regulation is facially neutral towards religion.[47] In other words, if a government action is fa-

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importance of all laws against the centrality of all religious beliefs.

Id. at 1606.

[43] *Id.* at 1617 (Blackmon, J., dissenting). The *Smith* dissent stated that "[f]ailure to reduce the competing interests to the same plane of generality tends to distort the weighing process in the state's favor." *Id.* (Blackmon, J., dissenting). In other words, this seems to say that one can always make the state's interest broad enough so that the state wins.

[44] *Smith*, 110 S. Ct. at 1617 (Blackmon, J., dissenting). In this regard, the dissent pointed out that Peyote is used as part of a carefully circumscribed ritual, that there is practically no illegal traffic in Peyote, and that it has nothing to do with the vast and violent traffic in illegal narcotics that plague this country. *Id.* at 1618-20 (Blackmon, J., dissenting). Furthermore, about half the states, and the federal government, have maintained an exemption for religious Peyote use for many years. *Id.* at 1620 (Blackmon, J., dissenting).

[45] *Id.* at 1621 (Blackmon, J., dissenting).

[46] Douglas Laycock, *Formal, Substantive and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1009 (1990).

[47] *Smith*, 110 S. Ct. at 1599. Two other prominent views toward the free exercise cases can be described as "strict neutrality" and "strict separation." Strict neutrality requires religion to have no special status in the law's view and would demand that the government make no distinction on the basis of the religious or nonreligious character of the activities involved. Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1, 8 [hereinafter McConnell, *Accommodation of Religion*]. However, this view is deficient in that the government could

cially neutral, it is of no concern whether, as a by-product of this action, the free exercise of religion is hindered or burdened.

Therefore, from a precedential standpoint in the free exercise area, the *Smith* decision is very disturbing as it allows a law infringing upon the free exercise of religion to pass constitutional muster by meeting the mandates of formal neutrality and the mere rational basis test. Yet even more disturbing was the manner in which the Court sidestepped its role as defender of a minority religion, while stating that society could protect this value if it "believe[d] in the negative protection accorded to religious belief."[48] The founders drafted the religion clauses in order to avoid religious intolerance; they did not defer this decision to a majority action of the state.

III. Reliance on State Constitutional Provisions

In some cases, narrow constructions of federal rights have inspired states to examine their own constitutional provisions to determine if they could be construed more broadly.[49] For example, states have construed the right to education more broadly under their own constitutions than under the United States Constitution.[50]

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deny aid to an otherwise eligible organization merely because it is religious. Certainly this view is not the best because of the likelihood that it would produce results plainly inconsistent with free exercise. Accordingly, only Chief Justice Rehnquist appears to believe that the government may maintain such a position. A second view regarding the proper constitutional treatment of religion is of strict separation between church and state, wherein the government may not aid religion in any way whatsoever. *Id.* at 13.

[48] *Smith*, 110 S. Ct. at 1606. For a comparison with Mississippi's view in this area *see infra* note 73.

[49] In recent years there has been a substantial amount published regarding the use of state constitutions to secure individual liberties beyond what the United States Supreme Court has recognized by interpreting the federal constitution. *See, e.g., Symposium on State Constitutional Jurisprudence*, 15 HASTINGS CONST. L.Q. 391 (Spring 1988); *Symposium On The Revolution In State Constitutional Law*, 13 VT. L. REV. 11 (Spring 1988); Louis K. Bonham, Note, *Unnumerated Rights in State Constitutions*, 63 TEX. L. REV. 1321 (1985). This has been done to such an extent that it has been commonly referred to as a "rediscovery" of the broad guarantees of individual rights in state constitutions.

[50] For examples of notes written in other areas of the law, see Robert A.

In *Serrano v. Priest*,[51] a class action was brought asserting that the California Public School financing system violated the Equal Protection Clause of the Fourteenth Amendment[52] and Article I, sections 11 and 21 of the California Constitution.[53] The California Supreme Court stated that it construed both the state and federal provisions as "substantially . . . equivalent" and that "[c]onsequently, our analysis of plaintiffs' federal equal protection contention is also applicable to their claim under these state and constitutional provisions."[54] The court went on to hold that strict scrutiny must be applied since the right to public education is a fundamental right.[55] However, in *San Antonio Independent School District v. Rodriguez*,[56] which involved very similar facts, the United States Supreme Court held that education was not a fundamental right.[57]

Subsequently, in *Buse v. Smith*,[58] the Wisconsin Supreme Court, in contrasting its state constitution with the United States Constitution, held that the equal opportunity for education is a fundamental right.[59] Similarly, in *Horton v. Meskill*,[60] the Connecticut Supreme Court held that the right to education was fundamental, and therefore, the public school financing system in place was violative of the state constitution but *not* the United States Constitution.[61] Mississippi recognized minimally adequate education as a fundamental right under the state constitution in *Clinton Municipal Separate School District v. Byrd*.[62]

McLaren, *Environmental Protection Based on State Constitutional Law: A Call for Reinterpretation*, 12 U. HAW. L. REV. 123 (1990); James C. Harrington, *Free Speech, Press, and Assembly Liberties Under the Texas Bill of Rights*, 68 TEX. L. REV. 1435 (1990).

[51] 487 P.2d 1241 (1971), *cert. denied*, Clowes v. Serrano, 432 U.S. 907 (1977).

[52] *Serrano*, 487 P.2d at 1244.

[53] *Id.* at 1249 n.11.

[54] *Id.*

[55] *Id.* at 1244.

[56] 411 U.S. 1 (1973).

[57] *Rodriguez*, 411 U.S. at 35.

[58] 247 N.W.2d 141 (Wis. 1976).

[59] *Buse*, 247 N.W.2d at 147-49.

[60] 376 A.2d 359 (Conn. 1977).

[61] *Horton*, 376 A.2d at 374-75.

[62] 477 So. 2d 237, 240 (Miss. 1985).

However, the ultimate authority for a state constitution providing greater protection than the United States Constitution is from *Pruneyard Shopping Center v. Robins*.[63] Here, the Supreme Court stated that in the area of the right of free speech, earlier decisions by the Court restricting free speech in limited circumstances did not prohibit a state from exercising its "sovereign right to adopt in its own constitution individual liberties more expansive than those conferred by the Federal Constitution."[64]

IV. Applying the Mississippi Constitution

In applying the principle from *Pruneyard* to the free exercise of religion, the danger is that a state would interpret its own free exercise clause so broadly as to run afoul of the Federal Establishment Clause. Therefore, a state must walk a fine line under contemporary First Amendment jurisprudence between providing greater protection to thwart government impingement and advancing a religion.[65]

This being said, how does the Mississippi Constitution compare with the United States Constitution, and how should it protect religious liberty?

Article III, section 18 of the Mississippi Constitution provides:

> No religious test as a qualification for office shall be required; and no preference shall be given by law to any religious sect or mode of worship; but the free enjoyment of all religious sentiments and the different modes of worship shall be held

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[63] 447 U.S. 74 (1980).

[64] *Pruneyard*, 447 U.S. at 81.

[65] An important commentator has argued that despite the tension between the clauses, both "advance" religion and are intended to do so. McConnell, *Accommodation of Religion*, *supra* note 47, at 6. Our founders directly protected religions liberty via the two clauses of the First Amendment by preventing the government from interfering with a person's chosen religious belief or practice by prohibiting it or by exerting power or influence in favor of any faith. *Id.* at 1. The encouragement of religion (without favoring any one religion) was a manifestation of the widely-held belief among the founders that republican self-government could not succeed unless religious observance continued to foster a moral sense in the people. *Id.* at 19.

> sacred. The rights hereby secured shall not be construed to justify acts of licentiousness injurious to morals or dangerous to the peace and safety of the state, or to exclude the Holy Bible from use in any public school of this state.[66]

Does the Mississippi Constitution, and the cases construing it, provide greater protection to the right to free exercise of religion than its federal counterparts? There is no case authority which has directly addressed this question. In *In re Brown*,[67] the Mississippi Supreme Court stated that the First, Ninth and Fourteen Amendments and Article III, sections 18 and 32 of the Mississippi Constitution collectively form the "rule" granting the right to freely exercise one's religion;[68] however, the court made no comparison between these provisions.

Although we do not know how expansive the protections to the free exercise of religion will be under the Mississippi Constitution, we do know some of the limits which the Mississippi Supreme Court has placed on this right. In several cases, the court has drawn clear lines as to where the religious right ends. For example, the right to a teacher's religious expression ends where it adversely affects learning.[69] A mother's right to indoctrinate her child into her religious beliefs ends when it would involve physical danger to the child.[70] And finally, the right ends where it endangers the health of children.[71]

In addition to these holdings, the Mississippi Supreme Court went as far to say in *In re Brown* that "[rights to free exercise of religious belief] are subject to compromise *only* when they collide with conflicting rights vested in others."[72] This statement, coupled with assertions such as "[i]n this state we take quite seriously the free exercise of religious beliefs,"[73]

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[66] MISS. CONST. art. III, § 18.

[67] 478 So. 2d 1033 (Miss. 1985).

[68] *Brown*, 478 So. 2d at 1036.

[69] Mississippi Employment Sec. Comm'n v. McGlothin, 556 So. 2d 324, 329 (Miss. 1990).

[70] Harris v. Harris, 343 So. 2d 762, 764 (Miss. 1977).

[71] Brown v. Stone, 378 So. 2d 218, 221-23 (Miss. 1979).

[72] *Brown*, 478 So. 2d at 1036 (emphasis added).

[73] *McGlothin*, 556 So. 2d at 329. The Mississippi Supreme Court has stated that individual rights, such as religious rights, are granted for protection of the

tend to indicate that the court would be willing to grant this right broad protections under the Mississippi Constitution. The court has stated in this context that "[rights] are what give[] meaning to that article of American faith: that each human being is unique, that by virtue of his humanity he possesses an unalienable and undeniable dignity and worth that he is entitled to the maximum basic personal liberty consistent with like liberty for each other."[74]

Certainly one way in which the Mississippi Supreme Court ought to provide greater protection is by applying a compelling interest test to all state statutes infringing on religious exercise. Another would be by discarding formal neutrality. Yet still, there are a number of specific areas in which the court could protect religious exercise where the government seems to be trespassing on traditional free exercise rights of the church. Some of these areas listed by The Conference on Government Intervention in Religious Affairs held in 1982 in Washington, D.C. are:

1. Efforts by state and local governments to regulate fundraising by religious bodies.

2. Efforts to require religious bodies to register with and report to government officials if they engage in efforts to influence legislation (so-called "lobbying disclosure" laws).

3. Attempts by state departments of education to regulate the curriculum content and teachers' qualifications in religious schools.

4. Attempts by federal and state departments of labor to collect unemployment compensation taxes from church-related agencies that hitherto were exempt, as churches are exempt.

5. Use by intelligence agencies of clergy and missionaries as informants.

6. Placing a church in receivership because of allegations of mismanagement of church funds made by dissident mem-

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individual "against the tyranny of the majority and against the power of the state." *Brown*, 478 So. 2d at 1036. This is the much preferred position as compared with that recently espoused by the United States Supreme Court. *See supra* note 42 and accompanying text.

[74] *Brown*, 478 So. 2d at 1037.

bers.[75]

V. CONCLUSION

We were founded as a religious people, yet we also know that true religion cannot involve compulsion to support, attend, or profess any religious belief or place of worship. We believe not only that this would be tyrannical but that it would be sinful. "The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate . . . It is the duty of every man to render to the Creator such homage and such only as he believes to be acceptable to him."[76]

In recognizing this great truth, we have also recognized the distinction that must exist between the church and the civil government. For just as "the Church has no power of the sword to punish or to coerce, no authority to compel, no prisons, fines, or other punishments, like those inflicted [by the civil government, . . . likewise the civil government cannot] execute that which is executed by the Church."[77] We hold this because to allow a public official "to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy, which at once destroys all religious liberty; because he being the Judge of that tendency will make his own opinions the rule of judgment, and approve or condone the sentiments of others only as they square with, or differ from his own . . . ."[78] Accordingly, it is imperative that we protect religious exercise beyond the bounds of civil incapacitations. We must grant this,

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[75] Report of the Church/State Subcommittee of the General Assembly of the Presbyterian Church in America (submitted at the Fourteenth Meeting of the General Assembly in Philadelphia, Pa.).

[76] RONALD B. FLOWERS & ROBERT T. MILLER, TOWARD BENEVOLENT NEUTRALITY: CHURCH, STATE AND THE SUPREME COURT, 571 (Appendix B) (1977) (quoted from A Memorial, written by James Madison, delivered to the General Assembly of the Commonwealth of Virginia, 1785).

[77] JOHN CALVIN, INSTITUTES OF THE CHRISTIAN RELIGION (1536), *reprinted in* 5 THE FOUNDERS' CONSTITUTION 44 (Philip B. Kurland & Ralph Lerner eds., 1987).

[78] THOMAS JEFFERSON, *A Bill for Establishing Religious Freedom*, 12 June 1779, *reprinted in* 5 THE FOUNDERS' CONSTITUTION 77 (Philip B. Kurland & Ralph Lerner eds., 1987).

the most precious of personal liberties, the maximum protection consistent with the Establishment Clause. If the United States Supreme Court will not do it, then the Mississippi Supreme Court must.

Robert T. Jackson, Jr.

HARRIS V. UNITED STATES: WILL LOAN GUARANTEES PROVIDE AN INCREASE IN SUBCHAPTER S SHAREHOLDER BASIS?

I. INTRODUCTION

The modern trend[1] in small closely held corporations is for the shareholders to elect to be taxed under subchapter S of the Internal Revenue Code[2]. The allure of the S corporation is its ability to pass through deductible losses to its shareholders. These losses, subject to some limitations,[3] serve to shelter other personal income of the shareholder.[4]

Since the enactment of the original subchapter S legislation, the issue of deductible loss to the shareholder has been frequently litigated.[5] The reason for the litigation is that a shareholder's potentially deductible loss from an S corporation is limited to his or her basis in the S corporation at year end.[6] The term basis which depicts ownership in monetary value consists of two segments: basis of stock and basis of debt. Notwithstanding the simple wording and construction of the

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[1] As reported in the Wall Street Journal, "The Internal Revenue Service expects to get 801,700 S returns for 1987, up from 769,100 for 1986 and 564,219 for 1982. For 1992, it foresees 1,013,900 S returns - 22 percent of the corporate return total." Wall St. J., Mar. 23, 1988 at 1, col. 5.

[2] Under provisions of the Internal Revenue Code, as amended by the Subchapter S Revision Act of 1982. Pub.L. 97-354, 96 Stat. 1669, certain closely-held corporation may elect special tax treatment in which the corporate level tax is avoided and income or loss is passed through to its shareholders. 47A C.J.S. *Internal Revenue* § 335 (1990); *see* Jacobsson v. Commissioner, 54 T.C.M. (CCH) 1043, 1044 (1987) (with certain exceptions S corporations do not pay taxes). Exceptions include but are not limited to tax on excess net passive income under § 1375 and tax on built-in gains under §1374 of the Internal Revenue Code. DORENBERG, ET AL., FEDERAL INCOME TAXATION OF CORPORATIONS AND PARTNERSHIPS 569-79 (1st ed. 1987).

[3] *See infra* note 18 and accompanying text.

[4] *See* Diane Slinger, *RRA '90 Affects the S vs. C Election Decision*, J. TAX'N OF S CORP., Spring 1991, at 20, 20-25.

[5] Jamison and Gardner, *Basis in S Corporation Debt: Recent Litigation Offers Little Hope for Taxpayer Guarantees*, S CORP. J., Summer 1990, at 137.

[6] *Id.*

current statute conferring loss deductibility,[7] litigation abounds on the issue of whether basis can be created when a shareholder merely guarantees the indebtedness of the corporation.

In addressing the shareholder guarantee issue, the Fifth Circuit in *Harris v. United States*,[8] took the position that where personal guarantees remain unperformed, the shareholder's basis does not increase.[9] In *Harris*, the appellant shareholders deducted the net operating loss of their S corporation believing their personal guarantees on corporate notes provided them with the requisite basis necessary for deductibility under section 1374 of the Internal Revenue Code.[10] The court held that the personal guarantees of the shareholders did not increase their basis and thus the majority of the net operating loss was disallowed.[11] In reaching this decision, the court embraced economic outlay principles.[12] The court found the structure of the transaction was not lacking adequate substance or reality, however the court contended that the taxpayers did not provide an economic outlay justifying the basis claimed.[13]

This comment discusses the rationale and fairness of the *Harris* decision. Section II looks at the applicable code provisions dealing with the loss limitations. Section III identifies recent judicial treatment of shareholder guarantee issues in

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[7] I.R.C. § 1366 states in pertinent part:

(d) SPECIAL RULES FOR LOSSES AND DEDUCTIONS.

(1) Cannot exceed shareholders basis in stock and debt. - The aggregate amount of losses and deductions taken into account by a shareholder . . . . for any taxable year shall not exceed the sum of -

(A) the adjusted basis of the shareholder stock in the S corporation . . . , and

(B) the shareholder's adjusted basis of any indebtedness of the S corporation to the shareholder . . . .

I.R.C. § 1366 (1986 & Supp. 1991)

[8] 902 F.2d 439 (5th Cir. 1990)

[9] *Harris*, 902 F.2d at 445.

[10] *Id.* at 441.

[11] *Id.* at 445.

[12] *Id.* at 443.

[13] *Id.*

the S corporation arena. Section IV sets out the facts and holding of the *Harris* decision. Section V discusses and critiques the *Harris* decision. Finally section VI concludes that although a debt-equity analysis is clearly more logical and better reasoned than the economic outlay principle, this logic is eclipsed by the widespread acceptance of the outlay theory.

II. Statutory Framework of Subchapter S Loss Limitation

The code section responsible for determining the ultimate tax liability of S corporation shareholders is section 1366. Section 1366(a)(1) mandates that the S shareholder take into account her pro rata share of both separately treated items and non-separately computed income or loss.[14] Separately treated items may include short and long term capital gains, section 1231 gains or losses, dividends, investment interest, tax exempt interest income, and charitable contributions.[15] Non-separately computed income is essentially gross income less allowable deductions, excluding any items passed through separately.[16] The approach of subchapter S taxation is to fuse

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[14] I.R.C. §1366(a) (1986 & Supp. 1991) provides:

(a) Determination of shareholder's tax liability.

(1) In general. In determining the tax under this chapter of a shareholder for the shareholder's taxable year in which the taxable year of the S corporation ends (or for the final taxable year of a shareholder who dies before the end of the corporation's taxable year), there shall be taken into account the shareholder's pro rata share of the corporation's —

(A) items of income (including tax-exempt income), loss, deduction, or credit the separate treatment of which could affect the liability for any shareholder, and

(B) non-separately computed income or loss.

For purposes of the preceding sentence, the items referred to in subparagraph (A) shall include amounts described in paragraph (4) or (6) of section 702(a). (2) Non-separately computed income or loss defined. For purposes of this subchapter, the item "non-separately computed income or loss" means gross income minus the deductions allowed to the corporation under this chapter determined by excluding all items described in paragraph (1)(A).

Id.

[15] *See* I.R.C. § 702(a) (1986 & Supp. 1991) (list of separately treated items).

[16] *See supra* note 13; Lorence L. Bravenec, Federal Taxation of S Corpo-

subchapters C and K together and allow the shareholder to retain the benefits of incorporating while escaping double taxation.[17] An example of partnership influence is embodied in section 1366(b), which provides that items to be passed through separately must retain the character they had in the hands of the corporation.[18] The character of the item is determined at the corporate level rather than at the individual level.

Section 1366(d)(1) limits the pass through of losses and deductions available to the shareholder to the sum of the shareholders adjusted basis in the S corporation stock and the basis of any indebtedness of the corporation to the shareholder.[19] Stock basis is acquired when the investor contributes cash or property to a corporation and receives stock in exchange.[20] Generally the basis of stock increases upon the pass through of income or gain and decreases when a deduction or loss is transferred.[21]

RATIONS AND SHAREHOLDER, § 2.1.3 (2d ed. 1988) (generally any item which could have different tax consequences to different shareholders must be treated separately).

[17] *See* I.R.C. §§ 701-762; S. FIN. COMM. REP. No. 640, 97th Cong. 2d Sess. 5-6 (1982).

[18] *See* supra note 13.

[19] I.R.C. § 1366(d)(1) provides:

> (1) Special rules for losses and deductions.
>
> (2) Cannot exceed shareholder's basis in stock and debt. The aggregate amount of losses and educations taken into account by a shareholder under subsection (a) for any taxable year shall not exceed the sum of —
>
> (A) the adjusted basis of the shareholder's stock in the S corporation (determined with regard to paragraph (1) of section 1367(a) for the taxable year), and
>
> (B) the shareholder's adjusted basis of any indebtedness of the shareholder (determined without regard to any adjustment under paragraph (2) of section 1376(b) for the taxable year).

I.R.C. § 1366(d) (1986 & Supp. 1991).

[20] *See* I.R.C. §§ 351, 358 (1986 & Supp. 1991) (generally shareholder takes basis in stock equal to her basis in property contributed to corporation); I.R.C. § 1014 (1986 & Supp. 1991) (basis of property received from decedent equal to fair market value at date of death); *see also* Carol Lee Sangster, *Computing the Shareholder's Basis in the S Corporation*, J. TAX'N OF S CORP., Winter 1989, at 24-25.

[21] *See* I.R.C. § 1367(a). *See generally* William C. Bowers, *Building Up an S Shareholder's Basis through Loans and Acquisitions*, 2 J. TAX'N S CORP., Fall

Basis in debt has been narrowly construed by the courts to mean debt running directly from the corporation to the shareholder. Consequently shareholders attempting to gain debt basis through various methods of attribution have repeatedly failed.[22] Debt basis is significant because once a shareholder exhausts his stock basis he may continue to deduct pass through losses by reducing his basis in debt.[23] However the reduction cannot give the shareholder a negative basis[24] and any repayment of debt by the corporation will cause the shareholder to recognize the difference, if any, between his indebtedness basis and the payment received as personal income.[25] If basis is not zero there may be both a recoupment of basis and income derived from each payment.[26]

To wind up this overview of the statutory loss provision scheme, it should be noted that Congress, seeking to give relief from prior law, included in the Subchapter S Revision Act of 1982 section 1366(d)(2).[27] This section amended the statute to allow losses and deductions to be carried forward indefinitely.[28] The amendment was apparently intended to lessen the motive for basis manipulation.[29]

1989, at 22, 24-27 (Fall 1989).

[22] *See* I.R.C. § 1367(b); Frankel v. Commissioner, 61 T.C. 343, 350 (1973) (loan by C corporation to S corporation did not increase shareholder basis even though shareholders were identical), *aff'd*, 506 F.2d 1051 (3d Cir. 1979) (mem.); Prashker v. Commissioner, 59 T.C. 172, 176 (1972) (estate loans to S corporation did not increase basis even when shareholder was sole beneficiary of estate).

[23] *See supra* note 18 and accompanying text.

[24] I.R.C. § 1367(b)(2) (1986).

[25] *See* Cornelius v. Commissioner, 494 F.2d 465, 469-70 (5th Cir. 1974) (citing Smith v. Commissioner 424 F.2d 219 (9th Cir. 1970)); Novell v. Commissioner, 29 T.C.M. (CCH) 92, 93 (1970) (recognizes where face amount of debt exceeds basis; portion of each payment thereon must be included in income).

[26] *Cornelius*, 494 F.2d at 470; *see also* Rev. Rul. 64-162, 1964-1 C.B. 304, 305 (amount exceeding basis may be part capital gain and part ordinary income).

[27] Subchapter S Revision Act of 1982, Pub. L. No. 97-354, § 2, 96 Stat. 1669, 1677-79 (1982).

[28] *Id.*

[29] *Id.*

III. JUDICIAL TREATMENT OF SHAREHOLDER GUARANTEES

A. *Brown*

The first modern case addressing the shareholder guarantee issue as applied to S corporation losses was *Brown v. Commissioner*.[30] In *Brown* the taxpayers, shareholders of a subchapter S corporation, claimed deductions on their personal returns under section 1374[31] of the Internal Revenue Code to reflect the corporation's operating losses during the three years in question.[32] In calculating their pro rata deductions, the taxpayers increased their adjusted basis to reflect their portion of a personally guaranteed corporate loan obtained from a finance company.[33] Consequently, the taxpayers received enhanced loss deductions.[34] The Tax Court found that the personal guarantees did not increase adjusted basis and, accordingly, held the taxpayers liable for deficiencies for the years 1970, 1971, and 1972.[35]

On appeal, the Sixth Circuit agreed with the Tax Court and recognized that, before being entitled to a stepped-up basis, the taxpayer would have to make some *economic outlay* on the loan.[36] The taxpayers contended that the loan in effect had been made to them personally and was then advanced to the corporation as additional capital.[37] However, the court rejected the petitioners' "substance over form" argument noting that taxpayers were liable for the tax consequences they

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[30] 706 F.2d 755 (6th Cir. 1983).

[31] *See supra* note 7. At the time of the *Brown* decision, the applicable code section was § 1374(c), subsequently reenacted by the Subchapter S Revision Act of 1982. Subchapter S Revision Act of 1982, Pub. L. 97-354, 96 Stat. 1669 (1982); *see I.R.C.* § 1366(d) (current codification of provisions).

[32] *Brown*, 706 F.2d at 756.

[33] *Id.* The loan in question was from Westinghouse Credit Corporation for $400,000 and the agreement formally obligated the First Motor Inn, the S Corporation, to repay Westinghouse directly. *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.* The court also noted that without the economic outlay requirement the limitation contained in § 1374(c) could be easily skirted, thereby erecting a tax shelter Congress never intended to create. *Id.*

[37] *Brown*, 706 F.2d at 756.

actually executed, and they may not reap the benefits of some other transaction they might have effected instead.[38] The court distinguished *Blum v. Commissioner*[39] which the taxpayers relied on for their "substance over form" argument.[40] The court noted that while the *Blum* court admitted there might be circumstances in which guaranteed loans could constitute equity investment, the economic outlay requirement was not to be abandoned.[41]

B. Selfe

The Eleventh Circuit undertook the shareholder guarantee issue in the case of *Selfe v. United States*.[42] In *Selfe*, the taxpayer increased her debt basis in her S corporation by personally guaranteeing a loan that had originally been advanced to her personally but later converted to corporate debt upon the incorporation of her retail clothing business.[43] The Service disallowed a significant portion of the taxpayer's net operating loss deduction believing the deduction was limited

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[38] *Id.*; *see* Don E. Williams Co. v. Commissioner, 429 U.S. 569, 579 (1977) (taxpayer held to transaction he effected); Commissioner v. National Alfalfa Dehydrating & Milling Co., 417 U.S. 134, 149 (1974) (acknowledging that taxpayer is free to organize her affairs as she chooses but having done so she must accept tax consequences).

[39] 59 T.C. 436 (1972).

[40] *Brown*, 706 F.2d at 756. In *Blum* the taxpayer argued that his basis should have been increased by the amount of corporate debt that he had guaranteed. *Blum*, 59 T.C. at 439. Judge Fay considered the taxpayer's argument that his guarantee in substance, should have been an indirect capital contribution since the corporation was both insolvent and thinly capitalized. *Id.* However Judge Fay concluded that the taxpayer had failed to carry his burden and emphasized the bank looked to the corporation for repayment. *Id.* at 440.

[41] *Brown*, 706 F.2d at 756; *see* Perry v. Commissioner, 47 T.C. 159, 164 (1966), *aff'd*, 392 F.2d 458 (8th Cir. 1968) (until shareholder called on to pay on guaranty no debt exists for basis purposes under § 1374); Borg v. Commissioner 50 T.C. 257, 264 (1968) (money payable upon contingency does not become debt until contingency has happened).

[42] 778 F.2d 769 (11th Cir. 1985).

[43] *Selfe*, 778 F.2d at 770. Taxpayer was required to collateralize the loan with common stock of Avondale Mills. *Id.* Upon transfer of debt to the corporation the bank also acquired a security interest in the corporation's inventory, receivables and contract rights. *Id.* at 771.

to taxpayer's stock basis.[44] The district court, relying on the economic outlay concept,[45] established in *Brown* agreed with the Service and refused to allow a basis increase.[46]

On appeal the Eleventh Circuit only partially agreed with the economic outlay concept and found that it was not necessary in all cases to absolve a corporation's debt before a guarantor could recognize an increase in basis.[47] The Court relied on the debt-equity principles set forth in *Plantation Patterns, Inc. v. Commissioner*,[48] and concluded that a shareholder who has guaranteed a loan to a subchapter S corporation may increase her basis where the facts demonstrate that in substance the shareholder has borrowed funds and subsequently advanced them to the corporation.[49] The facts which persuaded the *Selfe* court to closely examine the substance of the transaction rather than blindly adhere to the form resulted from two bases of testimony. The first from a bank officer, who indicated the bank considered the shareholder as the primary source of repayment, and not the S corporation itself. The second basis of testimony established that the corporation was thinly capitalized.[50] Although not conclusive these facts strongly suggested that the bank considered the shareholder the true source of repayment.[51] Consequently, the Eleventh Circuit found summary judgment inappropriate and remanded

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[44] *Id.*

[45] *Id.* at 772. The concept set out as the economic outlay theory would only allow an increase in a shareholder's basis where the shareholder paid the corporation's debt. *Id.*; *see supra* notes 19-24 and accompanying text.

[46] *Id.*

[47] *Id.*

[48] *Id.* at 771. In Plantation Patterns, Inc. v. Commissioner, 462 F.2d 712 (5th Cir. 1972), *cert. denied*, 409 U.S. 1076 (1972), the former Fifth Circuit affirmed a Tax Court finding that a transaction structured as a loan by an independent third party to a corporation and guaranteed by a shareholder was in substance a loan to the shareholder followed by his contribution of the loan proceeds to the capital of the corporation. *Selfe*, 778 F.2d at 771. Note that *Plantation Patterns* involved the Service arguing to recharacterize note payments made by a C Corporation to its shareholders as constructive dividends via debt-equity rationale. *Id.*

[49] *Id.* at 775.

[50] *Id.* at 774-75. The taxpayer further supported this testimony by noting that it would have been highly unlikely for the bank to lend money to a fledgling corporation operated by a novice in a competitive line of business. *Id.*

[51] *Id.* at 775.

the case for the court to apply debt-equity factors[52] to determine whether the shareholder guarantee constituted an investment in the corporation.[53]

C. *Leavitt*

The turmoil continued with the Fourth Circuit's decision in *Estate of Leavitt v. Commissioner*.[54] In *Leavitt* the shareholders of an S corporation, which operated an amusement park near Tampa, Florida, claimed deductions pursuant to Section 1374 of the Internal Revenue Code of 1954 to reflect the corporation's operating losses for the three years in question.[55] The shareholders increased their respective basis in the S corporation by the proportionate amount of corporate debt[56] they had each personally guaranteed.[57] The Service

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[52] *Id.* The court cited *In re* Lane, 742 F.2d 1311 (11th Cir. 1984), which listed the following thirteen factors as beneficial in a debt-equity determination:

1. the names given to the certificates evidencing the indebtedness;
2. the presence or absence of a fixed maturity date;
3. the source of payments;
4. the right to enforce payment of principle and interest;
5. participation in management as a result;
6. the status of the contribution in relation to regular corporate creditors;
7. the intent of the parties;
8. thin or adequate capitalization;
9. identity of interest between creditor and stockholder;
10. source of interest payments;
11. the ability of the corporation to obtain loans from outside lending institutions;
12. the extent to which the advance was used to acquire capital assets; and
13. the failure of the debtor to repay on the due date or to seek a postponement.

Lane, 742 F.2d at 1314-15.

[53] *Selfe*, 778 F.2d at 775. *See Lane*, 742 F.2d at 1319-20 (noting intent at time guarantee made is crucial to debt-equity determination); *Plantation Patterns*, 462 F.2d at 722-24 (guaranteed corporate loan deemed made to stockholder in C corporation); *Blum*, 59 T.C. at 439-49 (realizing possibility that guaranteed corporate loans could be re-characterized as equity by shareholder).

[54] 875 F.2d 420 (4th Cir. 1989), *aff'g* 90 T.C. 206 (1988), *cert denied*, 493 U.S. 958 (1989) (mem.).

[55] *Leavitt*, 875 F.2d at 421.

[56] *Id.* The seven shareholders of VAFLA, the corporation in question, increased

disallowed deductions above the appellant's original investments believing the personal guarantees did not increase basis.[58] The Tax Court agreed determining that guarantees unaccompanied by further acts did not constitute contributions of cash or property and therefore could not be used to increase stock basis.[59]

The taxpayers appealed to the Fourth Circuit contending that in substance they borrowed the money from the bank and then immediately contributed the money to the S corporation as equity.[60] The court found this argument unfruitful and discounted the debt-equity distinction as only secondary.[61] In so doing the court embraced the *Brown* decision and articulated that the appropriate inquiry was whether the guaranteed loan from the bank to the corporation was an economic outlay of any kind by the shareholders/guarantors.[62] The court approached the question with a two-part analysis.[63] The initial, and often dispositive, inquiry was whether there was an economic outlay by the shareholders.[64] Only if an outlay had occurred would the further determination of debt or equity be necessary.[65] The record clearly showed the bank had loaned

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their bases proportionately to reflect a $300,000 loan from the Bank of Virginia. *Id.*

[57] *Id.*

[58] *Id.*

[59] *Id.*; *see* Detroit Edison Co. v. Commissioner 319 U.S. 98, 102 (1943) (basis ordinarily means cost to taxpayer); I.R.C. § 1012 (1986) (basis of property shall be cost of such property). *But cf* I.R.C. § 752 (1986 & Supp. 1991) (in partnership context increase in liabilities increases partner's outside basis).

[60] *Leavitt*, 875 F.2d at 421-22. The shareholders supported this contention by voting that at the time of the loan the corporation was insolvent and thinly capitalized. *Id.* Accordingly, the appellants assert that the bank would not have loaned the funds without their personal guarantees. *Id.*

[61] *Id.* at 423.

[62] *Id.*

[63] *Id.*

[64] *Id.* If the guarantee had been triggered and payment made there would have been an economic outlay. *Id.*; *see* Underwood v. Commissioner, 535 F.2d 309, 312 (5th Cir. 1976) (unless surety or guarantor is called upon to pay debt basis investment does not increase); Perry v. Commissioner 392 F.2d 458, 461 (8th Cir. 1968) *aff'g* 47 T.C. 159, 163 (1966) (economic outlay required before basis of shareholder debt increased).

[65] *Id.*; *see* Wheat v. United States, 353 F. Supp 720, 723 (S.D. Tex. 1973) (mere guarantors could not bolster investment basis without paying obligation

money directly to the corporation, therefore the court determined that the shareholders had not made an economic outlay which preempted any further debt-equity analysis.[66] Further the court reasoned that a guarantee was merely a promise to pay in the future if certain unfortunate events occurred.[67] Since the guarantors experienced no call to perform under the guarantees they suffered no cost and no economic outlay had taken place.[68]

The court made a gallant attempt to reconcile its reasoning with the Eleventh Circuit.[69] Although ultimately rejecting the *Selfe* decision, the court noted on remand that two inquiries must be made in order to decide the issue. The first inquiry being whether the bank looked to the taxpayer, Jane Selfe, for repayment of the loan. The second inquiry was then to determine if the guarantee amounted to an equity investment or a shareholder loan to the S corporation based upon application of traditional debt-equity factors.[70] The court believed this to be a characterization of its two-step analysis with logical emphasis on economic outlay.[71] However, because of the *Selfe* court's suggestion that debt-equity principles alone would resolve the question of whether the bank loaned to the taxpayer/shareholder or the corporation, the court refused to adopt the Eleventh Circuit's reasoning.[72]

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owed to bank); Rev. Rul. 70-50, 1970-1 C.B. 178-79 (if payment made by guarantor basis in debt increases).

[66] *Leavitt*, 875 F.2d at 423. The court was not sympathetic towards the taxpayers but instead believed that they were playing "both ends against the middle"; if the corporation was profitable they would argue a true loan to the business; if the corporation lost money they would argue equity principles in an attempt to deduct the loss. *Id.*

[67] *Id.* at 422; *see* Perry v. Commissioner, 54 T.C. 1293, 1297 (1970) (mere exchange of shareholder's demand note for long term corporate note not economic outlay and therefore no basis increase); Raynor v. Commissioner, 50 T.C. 762, 770-71 (1968) (no form of indirect borrowing gives rise to indebtedness from corporation to shareholders until and unless shareholders pay part of obligation).

[68] *Leavitt*, 875 F.2d at 422.

[69] *Id.* at 426-27.

[70] *Id.*

[71] *Id.*

[72] *Id.* What actually got the Leavitt Court's attention was the statement by the Selfe Court that on remand the district court was to apply *Plantation Pat-*

IV. THE *HARRIS* DECISION

The facts of *Harris v. United States*[73] are relatively similar to those in *Brown, Selfe* and *Leavitt*. In *Harris*, the taxpayers had contracted to buy a pornographic theater and sought financing with Hibernia National Bank (HNB).[74] The bank gave the taxpayers an oral commitment to lend them $700,000.[75] Subsequently the taxpayers formed Harmar, a Louisiana corporation which elected subchapter S status.[76] The taxpayers each made a capital contribution of $1000 to the corporation in exchange for the corporation's stock. In addition, the shareholders each loaned Harmar $47,500 to satisfy operating expenses.[77]

The real estate purchase was closed on November 1, 1982, HNB furnishing the cash.[78] In addition to collateralizing the bank notes, the two shareholders also executed personal guarantees covering the entire amount of the loan.[79] On its income tax return for the year ending December 31, 1982, Harmar reported a net operating loss of $104,013.[80] Taxpayers each deducted one half of this loss pursuant to section 1374 of the Internal Revenue Code of 1954.[81] Upon auditing the taxpayers' return, the Service concluded that the taxpayers were limited to loss deductions of only $48,500 each, repre-

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terns to determine if bank loan was a corporate loan or loan to taxpayer. *Id.*

[73] 902 F.2d 439 (5th Cir. 1990).

[74] *Harris*, 902 F.2d at 440.

[75] *Id.*

[76] *Id.* Taxpayers intended to convert the property into a wedding hall and chose the corporate form to enhance their chances of qualifying for industrial revenue bonds and to limit their personal liability. *Id.*

[77] *Id.* The corporation had two owners, J.H. Harris and William J. Martin, who each owned one-half of the stock. *Id.*

[78] *Id.* Harmar executed two promissory notes payable to HNB for $350,000 each dated November 1, 1982. *Id.*

[79] *Harris*, 902 F.2d at 440. In addition to personal guarantees one of the notes were secured by two certificates of deposit totalling approximately $355,000. *Id.* Harmar secured the other note with its collateral pledge agreement, by its $3,000,000 note and its mortgage on the theater. *Id.*

[80] *Id.* at 440-41.

[81] *Id.* at 441. Since the tax year in question ended prior to January 1, 1983, the Subchapter S Revision Act of 1982 was not applicable. *Id.* at 441, n.4.

senting their bases in both stock and loans to the corporation.[82] The taxpayers paid their additional tax liabilities and appealed the district court's summary judgment dismissing their suit for refund.[83]

On appeal, the Fifth Circuit followed the reasoning of the *Brown* and *Leavitt* decisions and concluded that unless the shareholders made an economic outlay their bases in the subchapter S corporation could not be increased.[84] In so doing, the court refused to consider the debt-equity distinction espoused in *Selfe*, noting that an economic outlay was essential.[85] The taxpayers argued that the substance, rather than the actual form chosen for the transaction, should dominate and urged the court to recast the transaction as a bank loan to the shareholders followed by a deemed transfer to the corporation.[86] The court rejected this contention, apparently convinced by the record that the form of the transaction matched the substance actually intended by the parties involved.[87] Moreover, the court suggested that if in fact the transaction should be recast, the appropriate form might be a property

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[82] *Id.* at 441.

[83] *Id.*

[84] *Id.* at 443. *see* Ray v. Commissioner, 61 T.C.M. (CCH) 2122, 2131 (1991) (personal guarantee not sufficient to increase basis); Nigh v. Commissioner, 60 T.C.M. (CCH) 91, 95 (1990) (no distinction between co-maker and guarantor neither entitled to basis increase without economic outlay); Erwin v. Commissioner, 56 T.C.M. (CCH) 1343, 1346-47 (1989) (taxpayer receives no increase in basis for mere guarantee of debt).

[85] *Harris*, 902 F.2d at 443. Although the Court chose to follow *Leavitt*, the opinion appeared to apply a debt-equity analysis. *Id.* at 443-44.

[86] *Id.* at 443; *see* Casco Bank & Trust Co. v. United States, 544 F.2d 528, 533-34 (1st Cir. 1976) (shareholder's agreement to indemnify bonding company characterized as a capital contribution) *cert. denied*, 430 U.S. 907 (1977); Santa Anita Consol., Inc. v. Commissioner, 50 T.C. 536, 550 (1968) (determination of whether guaranteed debt was indirect capital contribution must be resolved using traditional debt-equity principles).

[87] *Harris*, 902 F.2d at 443-44. The court arrived at this conclusion after considering the following: 1) each note was executed by and solely in the name of Harmar; 2) the renewals were also made in the corporate name; 3) Harmar paid all interest and these payments were reflected on its books; 4) loan was also reflected on the books as indebtedness to HNB; 5) corporate income tax return was inconsistent with taxpayers present contention; 6) taxpayers did not treat the loan as personal and likewise did not treat interest payments made by Harmar as construction dividend income. *Id.*

purchase by the shareholders who then transfer the property to the corporation pursuant to section 351 of the Internal Revenue Code.[88] Consequently, the transfer of encumbered property to the corporation for stock would reduce the shareholder's basis to zero under section 358(d) of the Code.[89]

V. DISCUSSION

As set out earlier in this comment, the judiciary developed two theories regarding shareholder guarantees. The dominant theory is the economic outlay approach. This theory is advanced in the *Leavitt* decision. The less accepted theory is embodied in the *Selfe* case and involves a substance over form argument which requires application of debt-equity principles. The *Harris* court chose to follow *Leavitt* but in so doing apparently considered the *Selfe* reasoning, creating an unstable, if not erroneous, conclusion.

The decision in *Harris* is incorrect despite the long line of case law interpreting shareholder guarantees as adding nothing to stock or debt basis until an economic outlay has been made.[90] The *Harris* court improperly concluded that *Leavitt* controlled even though the bank looked primarily to the shareholders for repayment.[91] The court erred by applying the economic outlay theory[92] rather than traditional debt-equity principles as urged by the shareholders in their sub-

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[88] *Id.* at 445. The typical section 351 transaction involves a shareholder contributing cash or property in exchange for stock and unlike normal transactions no gain or loss is recognized but is instead reflected in the shareholders stock basis and any gain or loss is recognized when the stock is disposed of. I.R.C. § 351 (1986).

[89] *Harris*, 902 F.2d at 445. Section 358 of the Code preserves any nonrecognized gain or loss resulting from a 351 transfer. I.R.C. § 358 (1986). Under section 358(d) property transferred to a corporation for stock which is subject to a liability results in the liability assumed being treated as money which reduces the stockholders basis by the amount of the liability. I.R.C. § 358(d) (1986); *see also* Susan L. Megaard, *No Stock Basis for Shareholder Guarantee of S Corporation Debt: Tax Court Elevates Form Over Substance in Leavitt*, 15 J. CORP. TAX'N 340, 351 (1989) (recognizing danger involved in shareholder contributing property subject to debt).

[90] *See supra* notes 61, 62, and 64.

[91] *Harris*, 902 F.2d at 442.

[92] *See supra* notes 81, 82 and accompanying text.

stance over form argument and by failing to give adequate consideration to substantive facts which would have led to the opposite conclusion under the court's substance over form analysis.

A. Substance Over Form; Economic Outlay

In *Selfe v. United States* the Eleventh Circuit held that traditional debt-equity principles are applicable in determining whether a shareholder guaranteed S corporation debt should be classified as an indirect capital contribution.[93] The *Selfe* court believed the critical inquiry to be whether the bank looked primarily to the shareholder or the corporation for repayment.[94] Thus, the substance of the transaction was to be determined before embarking on the ultimate issue of possible basis increase. Judge Fay's vigorous dissent in *Leavitt* pointed out that the substance of the transaction should be determined first because the substance transcends the legal analysis.[95] Illustrating this was the situation involved in *Plantation Patterns*. Interest expense was deductible by subchapter C and subchapter S corporations via section 163.[96] The disallowance of the interest deduction in *Plantation Patterns* was independent of whether the corporation was taxed under subchapter C or subchapter S.[97] Likewise, if a guarantee of a corporate debt was in substance a contribution to capital then it should be a capital contribution regardless of whether it was a C or S corporation. This analysis should destroy the *Leavitt* court's unwillingness to apply the same rules to S corporations as they do in C corporations. However, the courts have ignored a substantial amount of applicable precedent[98] and apparently sided with the Service. This pro-

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[93] *See supra* text accompanying notes 44-46.

[94] *See supra* text accompany notes 47, 48.

[95] Estate of Leavitt v. Commissioner, 90 T.C. 206, 224-25 (1988) (Fay, J., dissenting).

[96] *Leavitt*, 90 T.C. at 224-25 (Fay, J. dissenting).

[97] *Id.* (Fay, J., dissenting).

[98] *See Leavitt*, 90 T.C. at 225 (Fay, J. dissenting) ("whatever sin was committed by the 11th Circuit in relying on subchapter C precedent in a subchapter S case, this Court has committed on innumerable occasions").

vides the Service a strong argument for substance over form and traditional debt-equity principles when trying to recast transactions as equity in C corporation circumstances while strictly holding taxpayers to the form of their transaction in the subchapter S domain.[99] Still, logic would seem to insist on determining the substance of the transaction independent of either party's requested relief.

As for needing an economic outlay to trigger a basis increase the *Harris* court failed to realize that the appropriate economic outlay had already taken place. The significant outlay was the original disbursement from the bank to the shareholders.[100] The shareholders were then deemed to have contributed the proceeds of the borrowing to the corporation as equity which would have the same effect as increasing their bases in stock. The *Harris* court adopted the *Leavitt* reasoning which assumed the taxpayer wanted to increase his basis in corporate debt rather than stock. In such a situation, the bank, in effect, loans the money to the shareholders who then loan the money to the corporation. In this instance the shareholder, pursuant to subrogation principles discussed in *Putnam v. Commissioner,*[101] would be required to make payment on the bank loan before realizing an increase in basis, the *Leavitt* type of economic outlay.[102] The *Harris* Court erred by relying on *Putnam* and section 1374(c)(2)(B) to mandate a direct economic outlay before increasing the taxpayer's basis in stock. The court should have realized that the direct economic outlay principle applied to increase the shareholder's basis of indebtedness pursuant to section 1374(c)(2)(B).[103] A failure to distinguish between 1374(c)(2)(A) and (c)(2)(B) precluded the court from being able to justify a conclusion that an

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[99] *See generally* Richard H. Stamps, Comment, *Subchapter S Loss Limitation; The Effect of Shareholder Loan Guarantees on Basis*, 40 SW. L.J. 1241, 1258-60 (1987).

[100] *Leavitt,*, 90 T.C. at 229-31 (Fay, J. dissenting).

[101] 352 U.S. 82 (1956).

[102] *Leavitt*, 90 T.C. at 229-30 (Fay, J., dissenting). The *Putnam* decision stands for the proposition that before a guaranteed corporate debt could be treated as indebtedness of the corporation to the shareholder, the shareholder must pay the debt. *Id.* at 229-31 (Fay, J., dissenting).

[103] *Id.* at 229-31 (Fay, J., dissenting).

indirect contribution to capital had been made.

B. Debt-Equity Principles

As noted in the facts of *Harris*, the Fifth Circuit chose to follow *Leavitt* but strangely weighed debt-equity factors apparently to provide an "even if" justification for the disallowance of basis.[104] The court's conclusion here is equally wrong. *Harris* parallels *Selfe* and the result reached should have been identical. As in *Selfe*, the *Harris* case contained testimony from a bank officer indicating that the bank was primarily looking to the shareholders for repayment.[105] Also the original loan negotiations were with the shareholders individually not with promoters of a new corporation.[106] The negotiations with HNB cast the entrepreneurs as individuals and these negotiations resulted in an oral commitment to loan cash to the individuals rather than a corporation.[107] Only as an afterthought, in attempting to avoid adverse publicity did the taxpayers decide to shield themselves by creating a corporate person.[108] The court sought to substantiate the substance of the transaction by rationalizing that the form of the transaction must have equalled the substance because the taxpayers did what they intended to do.[109] While intent is usually important it is not mentioned in section 385[110] of the code, which lists several factors used in determining whether a purported loan is indebtedness or equity. The court believed the substance matched the form but did not appear to give the above mentioned facts the weight they deserved.

The economics of the transaction is that without the personal guarantees and the certificates of deposits the bank would probably have not loaned the corporation the money. It appeared the taxpayers transferred some type of asset to en-

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[104] *See supra* notes 82, 84 and accompanying text.
[105] *Harris*, 902 F.2d at 442.
[106] *Id.* at 440.
[107] *Id.*
[108] *Id.*
[109] *See supra* note 84 and accompanying text.
[110] I.R.C. § 385(b) (1986 & Supp. 1991)

able the corporation to acquire credit, yet the taxpayers were foreclosed from benefiting from this asset transfer. Clearly this was inequitable, especially in Harris' case where his certificates of deposit were also used as security. In my opinion this case should have been remanded to apply debt-equity principles to determine if the bank was primarily looking to the shareholders for repayment, giving adequate attention to all relevant facts in determining whether to treat the loan as an indirect capital contribution.

VI. CONCLUSION

The judicial landscape in the shareholder guarantee area is saturated with economic outlay ground cover in all but the Eleventh Circuit. Despite Judge Fay's convincing logic in both *Blum* and *Estate of Leavitt*, his ideas on shareholder guarantees remain unacceptable to the majority of courts which find solace without analyzing traditional debt-equity principles.

The Fifth Circuit's decision in *Harris* only reinforces the *Leavitt* type analysis and provides little if any impetus to challenge the harsh rule denying a basis increase on an unperformed guarantee. In fact, the most promising avenue of change may be the legislature. Here section 1366 could be sufficiently clarified to show taxpayers exactly what would be required for a basis increase and explain whether guarantees of corporate debt where the lender looks primarily to the guarantor for repayment will be sufficient to satisfy the outlay requirement.[111]

The current state of the law should remind practitioners that although aggressive arguments, well reasoned in logic and supported by law may be made to defend a transaction, conservative tax planners should avoid adopting these same positions in advance.[112] If litigation arises the attorney may find himself with a sound argument albeit an unfruitful one. Instead the shareholder should plan to make a direct loan to

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[111] *See supra* note 96 (author proposes legislative amendment).

[112] Mankoff & Olchyk, *Recent Federal Cases and Rulings*, J. TAX'N INTEREST, Winter 1989, at 321, 323.

the corporation even if this requires the shareholder to obtain a personal bank loan.[113] In this instance, the form should be rigidly maintained.

Danny P. Hall, Jr.

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[113] *Id.*

THE PROSECUTOR, THE INVESTIGATOR, THE ADMINISTRATOR, 42 U.S.C. § 1983 AND *BURNS V. REED*: THE HAMMER HAS DROPPED

> This is a lonehand fight. By Hades, I will not have any client of mine gagged and badgered in this fashion by a pack of curs and laughing hyenas . . . . I say it and I say it emphatically, without wishing for one moment to defeat the ends of justice . . . .[1]

Comely, pallid, J.J. O'Molloy's assessment of criminal prosecutors has not lost much since Joyce's mythical yet—to those victimized by malicious prosecutions—eerily familiar jurisprudence of 1904 Dublin. Because of this, perhaps the only individual more outraged by prosecutorial misconduct than the criminal-defense lawyer is the accused himself. What follows attempts to address O'Molloy's dithyramb: At what point may an accused, under 42 U.S.C. § 1983, have civil recourse for damages against a prosecutor? Discussion of this issue is not novel: a University of Mississippi law student expressed the same concern 15 years ago.[2] With this in mind, the following comment addresses the damage liability of a prosecutor under 42 U.S.C. § 1983 when the prosecutor acts outside of his role as a courtroom advocate. In particular, this comment focuses on the effect of the Supreme Court's decision in *Burns v. Reed*,[3] and

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[1] JAMES JOYCE, ULYSSES 455 (1914).

[2] Frank J. Hammond III, Note, *Civil Rights—Section 1983 Damages—Prosecutor Has Absolute Immunity From Civil Liability For Acts Committed Within The Scope of His Duties*, 47 MISS. L.J. 812, 820 (1976). The author's vehemence is best manifested in his own words.

> Although it is necessary to protect the honest, conscientious prosecutor from vexatious lawsuits, it is imperative that the dishonest prosecutor be discouraged from securing convictions at the expense of the constitutional rights of his victims. Accordingly, any available deterrent should be used to accomplish the goal of the criminal justice system—the triumph of justice rather than the conviction of defendants.

Id.

[3] 111 S. Ct. 1934 (1991).

how that decision affected errant federal court decisions—most notably in the Fifth and Fourth Circuit Courts of Appeals. It is the hope of the author that this comment will assist civil-rights lawyers seeking redress for wronged, criminal defendants throughout the United States.

I. BACKGROUND

State officials acting under color of law are individually liable for damages under 42 U.S.C. § 1983.[4] However, a government official named in any § 1983 damage action may raise an official immunity defense.[5] Depending potentially on the activity which gave rise to the suit, the degree of injury and the named official's requirement for damage insulation,[6] this defense would entitle the official either to qualified[7] or absolute

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[4] Monroe v. Pape, 365 U.S. 167, 186-87 (1961), *overruled on other grounds,* Monell v. Department of Social Serv. 436 U.S. 658 (1978). The Court held that § 1983 must be "read against the background of tort liability that makes a man responsible for the natural consequences of his action." *Monroe,* 365 U.S. at 187; *c.f.* Jon O. Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct,* 87 YALE L.J. 447, 451-52 (1978) (in wake of *Monroe v. Pape,* individual may potentially sue any government official at law or in equity under § 1983).

[5] Mayer G. Freed, *Executive Official Immunity for Constitutional Violations: An Analysis and a Critique,* 72 NW. U. L. REV. 526, 533-35 (1977). While the federal courts generally did not consider an official immunity defense extended to judges, legislators and state executives under § 1983 actions during the second-quarter of the 20th Century, the Court reversed this trend in 1951 when it first held that § 1983 liability against government officials would not be limitless. *Id.*; Katz v. Morgenthau, 709 F. Supp. 1219, 1232-33 (S.D.N.Y.) (availability of qualified immunity depends on functional nature of prosecutor's duties and not on status of prosecutor), *modified,* 892 F.2d 20 (2d Cir. 1989).

[6] Ann Woolhandler, *Patterns of Official Immunity and Accountability,* 37 CASE W. RES. L. REV. 396, 397 (1987). Proper analysis of whether a qualified immunity defense was available was controlled by a "functional approach." *Id.* at 396. According to Woolhandler, the Court initially examined an official's claim for immunity in light of the activity which gave rise to the litigation. *Id.* at 396-97. The Court then examined the type of injury for which the suit was brought and any policy reasons that may have existed to insulate the official/defendant from damages. *Id.* at 397.

[7] Butz v. Economou, 438 U.S. 478, 506-07 (1978). The Court stated it established a qualified immunity defense as it "recognized that it is not unfair to hold liable the official who knows or should know he is acting outside the law, and that insisting on an awareness of clearly established constitutional limits will not unduly interfere with the exercise of official judgment." *Id.*

immunity.[8] Government officials are immune only from § 1983 suits for damages.[9] Along this line, then, while the Court has held prospective relief is available to § 1983 complainants in actions against government officials,[10] the Court has long since established that judges[11] and legislators[12] were absolutely immune from damages based on actions that occurred while performing official acts.[13]

The application of absolute immunity for certain govern-

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[8] Barr v. Matteo, 360 U.S. 564, 569 (1959). Absolute immunity bars a civil damage award against any official who bears it. *Id.*

[9] PETER W. LOW AND JOHN C. JEFFERIES, JR., FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS 904 (1989). Official immunity does not extend to actions for declaratory judgment or injunctive relief. *Id.*

[10] Pulliam v. Allen, 466 U.S. 522 (1984). In *Pulliam*, suit was brought under § 1983 to enjoin a state magistrate from jailing individuals brought before her on non-jailable misdemeanors. *Id.* at 525. As there had been no history of absolute immunity available to judges for prospective relief, and as the Court believed judges did not need the insulation of absolute immunity to remain independent, the Court held judicial immunity was not a bar to prospective relief against a judicial officer. *Id.* at 536, 541-42.

[11] Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1872). A judge disbarred a lawyer for insulting him during a murder trial. *Id.* at 344-45. The lawyer then sued the judge, claiming the disbarment was unauthorized. *Id.* at 345. The United States Supreme Court held the disbarment was within the judge's authority, even though the judge erred in not giving the lawyer an opportunity to either explain or apologize for his actions. *Id.* at 356-57. However, because the disbarment was a judicial proceeding and the judge had proper jurisdiction, the Court refused to nullify the judge's action. *Id.* at 357; *see also*, Stump v. Sparkman, 435 U.S. 349, 355-57 (1978) (judge, so long as he was acting under proper jurisdiction, was absolutely immune from damages even though his actions were erroneous, malicious or exceeding his authority).

[12] Tenney v. Brandhove, 341 U.S. 367 (1951). In *Tenney*, members of the California State Legislature and the California Senate Fact-Finding Committee on Un-American Activities were named as defendants in a damage suit for deprivation of civil rights under the federal constitution. *Id.* at 370-371. The plaintiff lobbied the California State Legislature to stop funding the committee. *Id.* at 370. The Committee then launched a contempt proceeding against the plaintiff—a proceeding the plaintiff alleged was purely retaliatory. *Id.* at 371. The Court held a legislative body was immune from civil damages so long as the members of that body were acting within the sphere of legitimate legislative activity. *Id.* at 376-78.

[13] Richard A. Matasar, *Personal Immunities Under Section 1983: The Limits of the Court's Historical Analysis*, 40 ARK. L. REV. 741, 746 (1987). The absolute immunity defense does not apply to all unconstitutional acts of state legislators and judges, but only to those unconstitutional actions performed under color of their office. *Id.*

ment duties originated in common law.[14] The Court determined that Congress never intended to abolish these immunities when establishing the § 1983 damage remedy.[15] However, in *Pierson v. Ray*,[16] the seminal case establishing a qualified immunity for state officials,[17] the Court held that police officers were entitled to raise a defense of good faith and probable cause in a § 1983 damages action[18] when acting within the parameters of their job[19] rather than bar the damage suit with an absolute immunity defense.[20] To prove a good faith and probable cause defense, the officers would have to convince a fact-finder they had probable cause to believe an arrest was necessary to preserve public order[21] and, while they were not

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[14] Matasar, *supra* note 12, at 746. The § 1983 language does not explicitly overrule common law immunity. *Id.*

[15] *Id.* Since, however, the language of § 1983 does not explicitly provide government officials with common law defenses, a question remains as to whether the drafters of the Civil Rights Act of 1871 intended to maintain these defenses for governmental officials. *Id.*

[16] 386 U.S. 547 (1967).

[17] Gary S. Gildin, *Immunizing Intentional Violations of Constitutional Rights Through Judicial Legislation: The Extension of* Harlow v. Fitzgerald *to Section 1983 Actions*, 38 EMORY L.J. 369, 371 (1989). The Court, however, did not establish whether a subjective or objective test would be applied to determine whether the qualified-immunity defense existed. *Id.*

[18] *Pierson*, 386 U.S. at 556-57. Relying on the logic of Monroe v. Pape, 365 U.S. 167 (1961), the *Pierson* court held § 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." *Pierson*, 386 U.S. at 556 (*citing* Monroe, 365 U.S. at 187). Because of this, police officers were allowed the same defense of good faith and probable cause on a federal-based claim for deprivation of civil rights as they were in the state claims of false arrest and false imprisonment. *Id.* at 557.

[19] *Id.* at 552. In *Pierson*, a police officer employed by the city of Jackson, Mississippi, arrested white and black clergymen at a segregated bus terminal after the clergymen refused to leave a "White Only" waiting room. *Id.* at 552-53. The clergymen were charged under a Mississippi statute criminalizing a breach of the peace in a public place. *Id.* at 549. The defendants then waived a jury trial and were found guilty of violating the statute by a municipal police justice. *Id.* Each defendant was sentenced to four months incarceration and fined $200. *Id.* at 549-50. Eventually, however, all charges were dropped after one of the defendants successfully appealed his conviction. *Id.* at 550.

[20] *Id.* at 557. The Court also held the judge, who was named in the suit, absolutely immune from damages. *Id.* at 553-54. Relying on the *Fisher* doctrine, the Court wrote, "[f]ew doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction . . . ." *Id.* at 553-54.

[21] *Id.* at 557. The clergymen argued not only that they were arrested under

charged with predicting the future course of constitutional law, they made the arrest with a good faith belief that their official actions were constitutional.[22] Thus, if read by itself, *Pierson* provides a fact-intensive test:[23] every question of good-faith reliance and probable cause would come down to an application of the qualified immunity defense to the particular dilemma of the official.[24] Subsequently, the Court befuddled the *Pierson* test in *Scheuer v. Rhodes*.[25]

The *Scheuer* court held that high-level, state executives performing job-related duties[26] were entitled to a qualified

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an unconstitutional statute, but that they also were arrested for a breach of peace when, in fact, no member of the public was threatened or disturbed by their presence in the waiting room. *Id.* The Court held that the issue of whether the arrest was "necessary" was a fact question for the jury. *Id.* at 557-58.

[22] *Id.* at 557. The Court developed the two-part, qualified-immunity analysis as follows: "If the jury believed the testimony of the officers and disbelieved that of the ministers, and if the jury reasonably believed in good faith that the arrest was constitutional, then a verdict for the officers would follow even though the arrest was in fact unconstitutional." *Id.*

[23] David Rudovsky, *The Qualified Immunity Doctrine in the Supreme Court: Judicial Activism and the Restriction of Constitutional Rights*, 138 U. PA. L. REV. 23, 28 (1989). The *Pierson* court determined, however, that a police officer would be absolutely immune from a § 1983 suit for damages if that officer acted in good faith and under a state statute, which he had no reason to believe was unconstitutional, but that was in fact unconstitutional. *Id.* at 38 n.89.

[24] Laura Oren, *Immunity and Accountability in Civil Rights Litigation: Who Should Pay?*, 50 U. PITT. L. REV. 935, 944-45 (1989). The policy behind the qualified immunity defense is "the desire to protect these public servants from having to choose between being charged with dereliction of duty if they failed to make an arrest when they had probable cause, and being personally liable for damages if, in good faith, they dared to make an arrest." *Id.* at 945. As police officers, unlike judges, were not absolutely immune from damage suits at common law, police officers would be limited to the qualified immunity defense of good faith and probable cause. *Id.*

[25] 416 U.S. 232 (1974).

[26] *Scheuer*, 416 U.S. at 234. Respondents in this case were the Governor of Ohio, the Adjutant General and his assistant, the president of Kent State University and various members of the Ohio National Guard. *Id. Scheuer* was an amalgamation of three cases, each of them brought by the personal representatives of estates of three individuals killed in the May 1970 melee at Kent State University. *Id.* The respondents were named in § 1983 suits which claimed respondents "intentionally, recklessly, willfully, and wantonly" deployed the Ohio National Guard onto the Kent State campus. *Id.* at 235. This deployment of armed troops resulted in the deprivation of the lives of the decedents without due process of law. *Id.*

immunity defense, but that the degree of that immunity should be measured on a dynamic scale.[27] The level of immunity available to a defendant would be wholly dependent on the amount and type of job-related discretion available to the defendant, as well as the circumstances in which the defendant acted.[28] The Court stated, "It is the existence of reasonable grounds for the belief formed at the time and in light of all circumstances, coupled with the good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct."[29] Thus, while *Scheuer* concluded that the analysis of the scope of qualified immunity available to an officer of the executive branch was more complex than that performed in *Pierson*,[30] it never really defined what the parameters of this immunity would be.[31] Instead, the *Scheuer* test was more insinuation than declaration.[32]

In *Wood v. Strickland*,[33] the Court clarified the *Scheuer* qualified immunity paradigm of subjective good faith[34] and objective reasonableness.[35] In *Wood*, two high-school students

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[27] *Id.* at 247. The Court determined that qualified immunity of government officials in the executive branch would be of "varying scope[.]" *Id.*

[28] *Scheuer*, 416 U.S. at 247. The Court continued that the variation of the scope of qualified immunity will be "dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability was sought to be based." *Id.*

[29] *Id.* at 247-48.

[30] *Id.* at 246-47. Because the *Scheuer* court dealt with state executive matters among an amorphous group of decision makers, it found any judicial decision on the matter of qualified immunity would arise in "an atmosphere of confusion, ambiguity and swiftly moving events[.]" *Id.* at 247.

[31] Kit Kinports, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions*, 23 GA. L. REV. 597, 602 (1989). The *Scheuer* test suggested a subjective and an objective component for a qualified immunity test. *Id.*

[32] Rudovsky, *supra* note 21, at 39. The *Scheuer* court spoke "only in general terms, and provided little guidance regarding the specific application of the defense to executive officials." *Id.*

[33] 420 U.S. 308 (1975).

[34] Kathryn R. Urbonya, *Problemative Standards of Reasonableness: Qualified Immunity in Section 1983 Actions for a Police Officer's Use of Excessive Force*, 62 TEMPLE L. REV. 61, 71 (1989). This alteration did not come quietly as four justices dissented on the ground that the *Wood* court should not depart from *Scheuer*. *Id.*

[35] *Id.* According to Urbonya, *Wood*, quite simply, put the burden on school members to determine what constitutional rights are "clearly established." *Id.*

brought a § 1983 action seeking damages[36] from school board members[37] who voted to expel the students. The students claimed their due process rights were violated in light of the fact that the school board expelled them[38] without providing adequate notice of the board's meeting.[39] In a break from the murkiness of *Scheuer*, the Court held a proper analysis of qualified immunity must include an objective as well as a subjective test of good faith.[40] For a finding on the objective element, the jury would consider whether the board member's action violated a student's clear constitutional right which that board mem-

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[36] *Wood*, 420 U.S. at 310. The students sought the following: declaratory relief regarding the alleged unconstitutionality of the regulation under which they were expelled; injunctive relief allowing the students to resume their schooling; a prohibition of any future sanctions from the school district resulting from their expulsion and a bar to the school district's use of the regulation again; an expungement of any notice of the expulsion from their school records; and compensatory and punitive damages. *Id.*

[37] *Id.* at 309-10. The students named the members of the school board, two school district administrators and the school district itself in their complaint. *Id.* The students sought monetary damages from all defendants. *Id.* at 310.

[38] *Id.* at 310. The students, both tenth-graders at the public high-school, were charged with violating a school district regulation against the consumption of intoxicants at school activities. *Id.* at 311. At an extracurricular, parent-student function, the students surreptitiously introduced 24 ounces of malt liquor into the punch. *Id.* Several days later, the principal of the high-school which both students attended was informed that the students had "spiked the punch." *Id.* at 312. The principal suspended both students for two weeks. *Id.*

[39] *Id.* at 312-13. On the day the students were suspended, the principal informed them the school board would convene that night to determine what—if any—additional sanctions they would suffer. *Id.* at 312. The principal told the students they were free to tell their parents about the school board meeting, but that their parents should not contact any board members. *Id.* At the meeting, the school board voted to expel the students for the remainder of the semester. *Id.* At a meeting held after the board's action, the students appeared before the board with their parents and legal counsel. *Id.* at 312-13. The students—once-again—admitted to spiking the punch, but asked the board to reconsider their expulsion. *Id.* at 313. The board refused. *Id.* In their complaint, the students alleged the expulsion procedure implemented by the defendants violated their rights to procedural due process. *Id.* at 310.

[40] *Id.* at 321. The Court held the appropriate test for qualified immunity should contain both an objective and a subjective element. *Id.* The objective element would require a fact-finder to determine whether the official knew or should have known his actions violated a clear constitutional right of the complainant. *Id.* The subjective element would require the fact finder to determine whether the official acted in good faith. *Id.*

ber either knew or reasonably should have known existed.[41] Regarding the subjective element, if the jury found the board member acted with malicious intent in depriving a student of his constitutional rights, then the board member would lose his qualified immunity defense and become open to damages.[42] As a result, a government official would be protected by a qualified immunity shield only so long as he acted without ignorance of the plaintiff's clear constitutional rights and without malice.[43]

Harlow v. Fitzgerald[44] eliminated the subjective prong of the *Wood* test.[45] In *Harlow*, the complainant sued two presidential aides for conspiring to have complainant retaliatorily terminated from the Department of the Air Force.[46] The District Court for the District of Columbia held there were genuine issues of material fact, and therefore the plaintiff survived

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[41] *Wood*, 420 U.S. at 322. The Court summed up the *Wood* test in one sentence: "A compensatory award will be appropriate only if the school board member acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith." *Id.*

[42] *See supra* note 40.

[43] William H. Theis, *"Good Faith" as a Defense to Suits for Police Deprivation of Individual Rights*, 59 MINN. L. REV. 991, 1016 (1975). The Court stated that the official must believe what he is doing is right; however, ignorance or disregard of the law cannot justify an act violating student's constitutional rights any more than actual malice can. *Id.*

[44] 457 U.S. 800 (1982).

[45] *Harlow*, 457 U.S. at 816. The Court began its reasoning with an argument that the subjective prong of *Wood* was working a disservice to officials/defendants. *Id.* at 816. In particular, the Court reasoned officials/defendants were unable to secure a summary judgment for insubstantial claims under the *Wood* test. *Id.* Instead, trial judges would allow the action to proceed as *Wood* required a subjective determination of bad faith on the part of the official. *Id.* In addition, as subjective questions of fact are rarely dispositive at the summary judgment stage, trial judges were not usually committing error through denial of these motions. *Id.* at 816-17. Because of this, the *Harlow* court held "bare allegations of malice" alone were not sufficient to survive summary judgment. *Id.* at 817-18. In doing so, the Court held the objective prong of the *Wood* test would be the sole test by which an official's conduct would be measured. *Id.* at 818. As a result, the availability of a qualified immunity defense would now turn "primarily on objective factors." *Id.* at 819.

[46] *Id.* at 802-05. The complainant also named President Nixon as a defendant. *Id.* at 802. Basically, the complainant alleged that after he revealed to the FBI that the Air Force wasted a great deal of money through poor purchasing practices, the defendants conspired to have him terminated. *Id.* at 804-05.

summary judgment under the strictures of qualified immunity.[47] The Court of Appeals for the District of Columbia dismissed a review of the district court holding without opinion.[48] On certiorari, the Supreme Court held any government official functioning within the discretionary parameters of his job retained immunity from damages so long as his actions did not violate a clearly established constitutional right.[49] Through excision of the subjective prong from *Wood*, *Harlow* sought to streamline the discovery process as well as avoid insubstantial lawsuits that would disrupt effective government.[50] *Harlow* remains the current test for qualified immunity from damages under § 1983.[51]

II. *IMBLER, BURNS* AND THE FUNCTIONAL APPROACH TO PROSECUTORIAL DUTIES: BRIGHT LINES ON BLURRED HIGHWAYS

When it comes to prosecutorial immunity for damages under 42 U.S.C. § 1983, all analysis begins with *Imbler v. Pachtman*.[52] The Los Angeles District Attorney charged Paul Imbler, an apprehensive and unlucky thief,[53] with murder

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[47] *Id.* at 802. The district court also explicitly ruled that none of the defendants—including former President Nixon—were entitled to absolute immunity. *Id.* at 806.

[48] *Id.*

[49] *Id.* at 818. The Court relied on an "objective reasonableness" test wherein the official would be granted summary judgment if he could prove he neither knew nor should have known he was violating a clearly established constitutional right. *Id.*

[50] *Id.* at 817-18. The Court wrote: "[W]e conclude today that bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery." *Id.* at 817-18.

[51] Kit Kinports, *Habeas Corpus, Qualified Immunity, and Crystal Balls: Predicting the Course of Constitutional Law*, 33 ARIZ. L. REV. 115, 117-18 (1991). Although *Harlow* remains the current test, the *Harlow* court never defined precisely what constituted a "clearly established right." *Id.* at 118. Rather, the Court established a matrix by which qualified immunity would apply to an official facing a § 1983 damage action in three subsequent cases: Davis v. Scherer, 468 U.S. 183 (1984); Mitchell v. Forsyth, 472 U.S. 511 (1985); Anderson v. Creighton, 483 U.S. 635 (1987). *Id.*

[52] 424 U.S. 409 (1976).

[53] *Imbler*, 424 U.S. at 411. Imbler turned himself into the Pomona, California police after an armed robbery which resulted in the shooting death of one of Imbler's accomplices. *Id.* A police investigation turned to an armed robbery which

during the commission of an armed robbery.[54] The jury convicted Imbler of felony murder and sentenced him to death.[55] Awaiting execution, Imbler's prosecutor, Richard Pachtman, filed a clemency petition for Imbler with the Governor of California.[56] Subsequent to this petition, Imbler began a state habeas corpus action wherein he charged that the prosecutor knowingly used false testimony, as well as suppressed material evidence.[57] The writ was denied by the California Supreme Court.[58] Several years later, Imbler filed a collateral petition for habeas corpus in federal district court.[59] The district court granted the writ.[60] The Court of Appeals for the Ninth Circuit affirmed,[61] and the United States Supreme Court denied a

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had taken place several days earlier. *Id.* As a result of this investigation, the District Attorney charged Imbler with felony murder of a proprietor of a market in Los Angeles. *Id.*

[54] *Id.* at 411. Imbler's alleged accomplice was killed during the commission of a second robbery, ten days after the murder for which Imbler was accused. *Id.*

[55] *Id.* at 412. The jury also sentenced Imbler to ten years for assault. *Id.* This sentence was to run consecutively with his death sentence. *Id.*

[56] *Id.* at 412-13. Pachtman brought forward two basic arguments: one, a newly discovered witness corroborated Imbler's alibi for the murder; two, testimony from a witness for the prosecution, a man named Costello, had turned up to be less than trustworthy. *Id.* In the petition, Pachtman established that leads to information available to him regarding the exoneration of Imbler could have been pursued more vigorously, but in light of Costello's strong testimony at the trial, those leads were not followed up. *Id.* Because of this, Pachtman filed a letter of clemency on grounds that "a prosecuting attorney has a duty to be fair and see that all true facts, whether helpful to the case or not, should be presented." *Id.* at 413.

[57] *Id.* at 413. Imbler charged the prosecution with use of false testimony as well as suppression of material information. *Id.* At the same time, Imbler also praised Pachtman for the candor of his letter to the governor. *Id.*

[58] *Imbler*, 424 U.S. at 413-14. The California Supreme Court denied the habeas writ. *Id.* The supreme court noted that Costello's recantation of testimony he gave at Imbler's trial was unconvincing. *Id.* at 414. In addition, the supreme court noted that witnesses who testified on behalf of Imbler at the habeas proceeding presented either unconvincing or impeached testimony. *Id.*

[59] *Id.* at 414. Imbler argued the same issues before the federal district court as he did before the California Supreme Court.

[60] *Id.* at 414. The district court concluded the state prosecution had committed misconduct and that the misconduct required a writ to be issued. *Id.* The district court, however, did offer the state the option to retry Imbler within 60 days to avoid issuance of a writ. *Id.* at 415. The state, ultimately, elected not to retry Imbler. *Id.*

[61] *Id.* at 415. In affirming the district court, the Court of Appeals for the

writ of certiorari.[62]

After his release from the penitentiary, Imbler launched a damage action against Pachtman under § 1983.[63] The district court granted defendant's motion for summary judgment.[64] The Court of Appeals for the Ninth Circuit affirmed.[65] On appeal, the United States Supreme Court held that a prosecutor, acting within the scope of his prosecutorial duties, was absolutely immune from damages under § 1983.[66] In response to arguments that civil liability was necessary to deter prosecutorial misconduct, the Court explained that prosecutors remained subject to punishment for such action under criminal law.[67] It is important to note that the Court did not address immunity for the prosecutor acting as an administrator or investigator.

> We agree with the Court of Appeals that respondent's activities were intimately associated with the judicial phase of the criminal process, and thus were functions to which the reasons for absolute immunity apply with full force. We have no

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Ninth Circuit held that the district court had merely reached a different conclusion than the California Supreme Court based on the same facts. *Id.*

[62] California v. Imbler, 400 U.S. 865 (1970) (mem).

[63] *Imbler*, 424 U.S. at 415. More than a decade after his conviction, Imbler brought a § 1983 damage suit against Pachtman and various police officials. *Id.* Imbler charged a conspiracy existed to convict him and sought $2.7 million in damages. *Id.* at 415-16.

[64] *Id.* at 416. The district court found all acts committed by a prosecutor within the traditional prosecutorial functions of his office were absolutely immune from damages. *Id.*

[65] *Id.* The Ninth Circuit found Pachtman's actions to be "an integral part of the judicial process." *Id.*

[66] *Id.* at 424. The Court concluded that if prosecutors received only qualified immunity for clearly prosecutorial acts, then the prosecutor would suffer unnecessary liability. *Id.* at 424-25.

[67] *Id.*, at 429. According to Justice Powell:

> This Court has never suggested that the policy considerations which compel civil immunity for certain governmental officials also place them beyond the reach of the criminal law . . . . The prosecutor would fare no better for his willful acts. Moreover, a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers. These checks undermine the argument that the imposition of civil liability is the only way to insure that prosecutors are mindful of the constitutional rights of persons accused of crime.

Id.

> occasion to consider whether like or similar reasons require immunity for those aspects of the prosecutor's responsibility that cast him in the role of an administrator or investigative officer rather than that of advocate. We hold only that in initiating a prosecution and in presenting the State's case, the prosecutor is immune from a civil suit for damages under § 1983.[68]

Fifteen years after avoiding consideration of what responsibilities potentially cast the prosecutor in the role of an administrator or investigator, the Court resolved the issue in *Burns v. Reed*.[69] In *Burns*, a woman was placed under arrest by the police in accord with legal advice provided by a local prosecutor that the police had probable cause for the arrest.[70] The prosecution charged the woman with the attempted murder of her two sons.[71] A county court judge issued a search warrant based on misleading testimony from the advising prosecutor and one of her arresting officers at a probable cause hearing.[72] However, the prosecution subsequently dropped all charges

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[68] *Imbler*, 424 U.S. at 430-31. The Court noted the "proper line" of what constituted a prosecutorial function and what constituted an administrative or investigatory function was not before it and would therefore not address it. *Id.* at 431 n. 33.

[69] 111 S. Ct. 1934 (1991).

[70] *Id.* at 1937. In 1982, the mother phoned the Muncie, Indiana police. *Id.* Her two sons had been shot, she had been knocked unconscious and had been shot herself. *Id.* The children were shot while they were sleeping. *Id.* The police ultimately considered the mother to be their primary suspect, speculating she suffered from a multiple-personality disorder and that one of her personalities, unbeknown to her core personality, committed the shootings. *Id.* The police consulted with Chief Deputy Prosecutor Richard Reed, the defendant in this action. *Id.* Reed told the police officers they could hypnotize the mother and conduct an interview with what may be one of the mother's personalities. *Id.* Under hypnosis, a personality of the mother inculpated itself in the shootings. *Id.* The mother was then detained while the police phoned Reed again. *Id.* Reed, again after being asked by the police, said the police "probably had probable cause" to make an arrest. *Id.* Predicating their actions on this statement, the police then placed the mother under arrest. *Id.*

[71] *Id.*

[72] *Id.* At the probable cause hearing, Reed and an arresting officer testified in an effort to obtain a search warrant for the mother's house and car. *Id.* Both the officer and the prosecutor utilized statements given by the mother under hypnosis. *Id.* Neither one, however, mentioned the statements were made while the mother was under hypnosis. *Id.*

when the trial judge granted the mother's motion to suppress statements she gave to police while under hypnosis.[73] The mother—now plaintiff—brought a § 1983 action for damages against the prosecutor.[74] The district court directed a verdict for the prosecutor, finding him absolutely immune from all liability.[75] The Court of Appeals for the Seventh Circuit affirmed.[76] The United States Supreme Court granted a writ of certiorari and reversed in part,[77] noting a split in the circuits regarding the qualified immunity of prosecutors for non-prosecutorial actions.[78] The Court held that a prosecutor was qualifiedly immune for legal advice the prosecutor gave to police as part of their investigation.[79] According to the Court, since advising police officers was not a traditional, prosecutorial duty, immunizing such advice with an impenetrable shield of absolute immunity would work an injustice.[80]

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[73] *Id.*

[74] *Id.* The plaintiff mother alleged defendant Reed violated her rights under the Fourth, Fifth, and Fourteenth Amendments. *Id.* She sought damages against the prosecutor as well as several others intimately involved in her arrest. *Id.*

[75] *Burns*, 111 S. Ct. at 1937. The district court found the defendant was immune for all claims made by plaintiff—whether those claims were based on his role as prosecutor or not. *Id.*

[76] Burns v. Reed, 894 F.2d 949, 953 (7th Cir. 1990), *modified*, 111 S. Ct. 1934 (1991). In addition, the circuit court held: a prosecutor should be afforded absolute immunity for giving legal advice to police officers about the legality of their prospective investigative conduct." *Id.* at 956.

[77] 111 S. Ct. at 1937-38.

[78] *Id.* at 1938 n.2. The Court pointed out some of the circuits were split regarding what constitutes "investigative" and "administrative" acts— particularly in matters of giving legal advice to the police. *Id.*

[79] *Id.* at 1945. The Court held providing legal advice to the police was inherently outside the role played by a prosecutor and, therefore, only entitled to qualified immunity. *Id.* The Court, however, did hold—in a reaffirmance of *Imbler*—the prosecution was absolutely immune from damages for appearances made in court, applications for a search warrant and presentation of evidence. *Id.* at 1944.

[80] *Id.* at 1944. The Court points out:

> Indeed, it is incongruous to allow prosecutors to be absolutely immune from liability for giving advice to the police, but to allow police officers only qualified immunity for following the advice. Ironically, it would mean that the police, who do not ordinarily hold law degrees, would be required to know the clearly established law but prosecutors would not.

Id. (citations omitted).

III. THE PROSECUTOR AS POLICE OFFICER: QUALIFIED IMMUNITY UNDER *BURNS*

The determination in *Imbler* that a prosecutor[81] was absolutely immune from § 1983 damages so long as he acted within the scope of his duties generated a great deal of litigation on the issue of whether certain acts were within the scope of a prosecutor's duties.[82] While a prosecutor was clearly immune from damages when acting as an appointed judicial advocate during a criminal trial,[83] federal courts consistently held a prosecutor absolutely immune from § 1983 damages for swearing out arrest warrants.[84] The courts have also found prosecutors absolutely immune from damages in the event a witness for the prosecution committed perjury[85]—at trial[86] or in front

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[81] Kukla v. Village of Antioch, 647 F. Supp. 799, 815 (N.D. Ill. 1986). A village attorney who functions as prosecutor must have actual, prosecutorial authority to assert Imbler immunity. *Id.*

[82] Kadivar v. Stone, 804 F.2d 635, 637 (11th Cir. 1986). With every action for § 1983 damages against a prosecutor, it was necessary to determine whether the prosecutor's actions fall into the zone of activity for which absolute immunity was available. *Id.*; *cf.* Henderson v. Lopez, 790 F.2d 44, 47 (7th Cir. 1986) (assistant state attorney advising county sheriff to jail defendant is entitled to absolute immunity even though he is not county employee); Mother Goose Nursery Schools, Inc. v. Sendak, 770 F.2d 668, 671-73 (7th Cir. 1985) (even when reviewing contracts, state attorney absolutely immune from § 1983 damages as contract reviewal and prosecutorial functions are analogous), *cert. denied*, 474 U.S. 1102 (1986).

[83] *See supra* note 65.

[84] Joseph v. Patterson, 795 F.2d 549, 555 (6th Cir. 1986), *cert. denied*, 481 U.S. 1023 (1987). Obtainment of arrest warrants, although through reprehensibly fraudulent means, still provides the obtaining prosecutor with absolute immunity. *Id.*; *see also* Ginter v. Stallcup, 641 F. Supp. 939, 972 (E.D. Ark. 1986) (prosecutor absolutely immune for filing false murder charges even if filing was done with "evil and sinister motive"), *modified*, 869 F.2d 384 (8th Cir. 1989); *cf.* McCuen v. Polk County, Iowa, 893 F.2d 172, 174 (8th Cir. 1990) (assistant county attorney with prosecutorial authority is absolutely immune from damages for securing ex parte order to temporarily remove child from alleged abusive residence); Walden v. Wishengrad, 745 F.2d 149, 152-53 (2d Cir. 1984) (department of social services attorney with prosecutorial authority held absolutely immune from damages for requesting warrant be issued to secure witness). *But see* Robison v. Via, 821 F.2d 913, 917-20 (2d Cir. 1987) (prosecutor was entitled to qualified immunity for personally participating in warrantless abduction of children for subsequent investigation of child abuse claims).

[85] Burns v. County of King, 883 F.2d 819, 823-24 (9th Cir. 1989). A prosecutor is entitled to absolute immunity from damages against an allegation he

of a grand jury[87]—and even if the prosecutor subornated the perjured testimony.[88] Finally, a prosecutor maintains absolute immunity from damages for perjured testimony he provided to a grand jury[89] and for any advice he gave to police officers regarding probable cause for arrest.[90] On the other hand, prosecutorial statements made to the press concerning a criminal defendant have universally been held to command only a qualified immunity,[91] as have actions taken by a prosecutor to

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used perjured testimony against the plaintiff to have the plaintiff's bail revoked. *Id.*

[86] Jones v. Shankland, 800 F.2d 77, 80 (6th Cir. 1986), *cert. denied*, 481 U.S. 1048 (1987). A county prosecutor was absolutely immune from damages for using perjured testimony at trial as well as failing to disclose exculpatory information to the defendant. *Id.*; Stokes v. City of Chicago, 660 F. Supp. 1459, 1461 (N.D. Ill. 1987) (prosecutor who offered to pay potential witnesses to give false testimony at murder trial found absolutely immune from damages).

[87] Morrison v. City of Baton Rouge, 761 F.2d 242, 247-49 (5th Cir. 1985). A state prosecutor who presented irrelevant evidence merely to undercut the testimony of another grand jury witness to secure an indictment, even though done maliciously, wantonly or negligently, acted within his prosecutorial function and was absolutely immune from damages. *Id.*

[88] Rose v. Bartle, 871 F.2d 331, 334 (3d Cir. 1989). Since solicitation of testimony was essentially a judicial function, even a prosecutor who suborned perjury remained absolutely immune from damages. *Id.*; Stevens v. Rifkin, 608 F. Supp. 710, 728 (N.D. Cal. 1984) (although prosecutors suborned perjury and concealed evidence, they retained absolute immunity).

[89] Grant v. Hollenbach, 870 F.2d 1135, 1141 (6th Cir. 1989). A prosecutor who perjured himself before a grand jury maintains absolute immunity from damages. *Id.*; Maglione v. Briggs, 748 F.2d 116, 118 (2d Cir. 1984) (presentation of case before grand jury amounts to prosecutorial function and therefore absolute immunity attaches).

[90] Marx v. Gumbinner, 855 F.2d 783, 790-91 (11th Cir. 1988). Police telephoned an assistant state attorney to inquire if they had probable cause to place a suspect under arrest for rape. *Id.* at 785. The attorney ultimately responded she believed the police had probable cause and the arrest was made soon after. *Id.* The Court of Appeals of the Eleventh Circuit held absolute immunity attaches when a prosecutor renders advice to police officers regarding the existence of probable cause to make an arrest. *Id.*; *see also* Flavel v. Logsdon, 718 F. Supp. 836, 838 (D. Or. 1989), *aff'd*, 936 F.2d 577 (9th Cir. 1991) (same result when prosecutor advises police not to make arrest); *cf.* Thomas v. Riddle, 673 F. Supp. 262, 264-65 (N.D. Ill. 1987) (prosecution absolutely immune from damages from advising police that warrantless search was legal). *But cf.* Wolfenbarger v. Williams, 826 F.2d 930, 937 (10th Cir. 1987) (prosecution is entitled to only qualified immunity for advising police to seize stolen goods from private property and return them to the rightful owner).

[91] Powers v. Coe, 728 F.2d 97, 103 (2d Cir. 1984). State prosecutor leaked

place a wiretap on a suspect's phone.[92] However, on an equal number of "within the scope of duties" questions that have come before the federal courts, there has been a divergence of opinion as to which prosecutorial actions constitute judicial functions. In the past decade, the federal districts and circuits have applied both absolute and qualified immunity to the following activities: threatening prosecution witnesses;[93] treatment of detainees;[94] unqualified hegemony on whether to

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grand jury information to the media concerning charges of corruption at the Connecticut Department of Transportation. *Id.* at 99-100. Complainant, commissioner of this department, brought suit claiming an entitlement to § 1983 damages from the prosecutor. *Id.* at 98-99. The Court of Appeals of the Second Circuit held prosecutorial statements made to the media were administrative and not quasi-judicial. *Id.* at 103. Therefore, a prosecutor was entitled to qualified immunity for statements made to the press regarding his duties. *Id.*; England v. Hendricks, 880 F.2d 281, 285 (10th Cir. 1989), *cert. denied*, 493 U.S. 1078 (1990) (explicitly adopting approval of other circuits, it was held that prosecutorial statements to press were entitled to qualified immunity); Gobel v. Maricopa County, 867 F.2d 1201, 1205 (9th Cir. 1989) (explicitly embracing *Powers v. Coe* rationale regarding qualified immunity for statements to press).

[92] Liffiton v. Keuker, 850 F.2d 73, 77 (2d Cir. 1988). Applying for a wiretap is not a clear prosecutorial function as the tap goes toward the investigative end of police work. *Id.* Prosecutors therefore enjoy only qualified immunity from damages for securing wire taps. *Id.*; *Powers*, 728 F.2d at 103 (as wiretaps are used to trap accused, tap was used for investigative purposes and therefore entitled prosecutor to qualified immunity).

[93] Williams v. Hartje, 827 F.2d 1203, 1209-10 (8th Cir. 1987). A prosecutor told an eyewitness to a beating that he had best not testify as to what he had witnessed. *Id.* According to the Court of Appeals of the Eighth Circuit, since calling a witness constituted a prosecutorial function intimately associated with the judicial process, a prosecutor retained absolute immunity from damages regarding witness testimony—even if that prosecutor threatened witnesses with violence. *Id.* *But see* Ginter v. Stallcup, 641 F. Supp. 939, 964 (E.D. Ark. 1986) (prosecutor who threatened as well as coordinated inhuman living conditions of detainees was entitled only to qualified immunity protection).

[94] Moore v. Floro, 614 F. Supp. 328, 335 (N.D. Ill. 1985), *aff'd*, 801 F.2d 1344 (7th Cir. 1986). At a social event, a prosecutor threatened the former investigator of the local public defender's office with a beating. *Id.* at 330. The investigator was subsequently beaten by deputy sheriffs and taken to a police station. *Id.* At the station, the investigator requested medical attention but the police and the prosecutor, who was present, ignored him. *Id.* The district court held the prosecutor must have a legal obligation to provide treatment to the investigator. *Id.* at 335. Because the investigator did not prove the prosecutor had such a duty, the prosecutor is entitled to immunity from damages under § 1983. *Id.*; *see* White v. Gerbitz, 860 F.2d 661, 662-65 (6th Cir. 1988), *cert. denied*, 489 U.S. 1028 (1989) (assistant district attorney held absolutely immune from damages for jailing un-

bring criminal charges;[95] securing writs of capias;[96] administrative acts in the prosecutor's office.[97]

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charged material witness in violation of court order). *Contra* Allen v. Lowder, 875 F.2d 82, 85-86 (4th Cir. 1989) (prosecutor was not absolutely immune for holding individual in jail after that individual's conviction was reversed); *Gobel*, 867 F.2d at 1205-06 (prosecutor was not absolutely immune for unlawfully detaining mistakenly arrested individuals in police wagon).

[95] Myers v. Morris, 810 F.2d 1437, 1445-46 (8th Cir.), *cert. denied*, 484 U.S. 828 (1987). Plaintiffs alleged a county attorney initiated a criminal proceeding against them without adequate investigation, destroyed evidence, suborned perjury and failed to disclose exculpatory evidence she did not destroy. *Id.* at 1445. The Court of Appeals of the Eighth Circuit held the prosecutor absolutely immune from damages for all these actions as they were within the fundamental ambit of prosecution. *Id.* at 1446. As the decision to file criminal charges was a fundamental, prosecutorial function, a prosecutor remained absolutely immune from damages no matter how abusive, vindictive, reckless, or conspiratorial these actions were. *Id.*; *see Grant*, 870 F.2d at 1138-39 (decision of prosecutor to file charges based on false information and inadequate investigation maintains absolute immunity); *cf.* Schloss v. Bouse, 876 F.2d 287, 288-89 (2d Cir. 1989) (prosecutor is absolutely immune from threatening falsely accused individuals by providing an ultimatum of either signing releases of claim against police agencies or facing malicious prosecution); Hammond v. Bales, 843 F.2d 1320, 1322-23 (10th Cir. 1988) (prosecution was absolutely immune from dismissing charges against guiltless plaintiff for plaintiff's voluntary release of claim). *Contra* Smith v. Updegraff, 744 F.2d 1354, 1364 (8th Cir. 1984) (county prosecutor's threats to prosecute individual giving unfavorable testimony before civil service commission held to be qualifiedly immune from damages).

[96] Hamilton v. Daley, 777 F.2d 1207, 1212-13 (7th Cir. 1985). Plaintiff alleged state and county prosecutors induced original complainants in a child-molestation incident to sign false statements against the plaintiff. *Id.* at 1210. State prosecutor swore out the functional equivalent of a capias for plaintiff. *Id.* at 1213. The Court of Appeals of the Seventh Circuit held the state attorney to be absolutely immune for filing the capias. *Id.*; Betts v. Richard, 726 F.2d 79, 80-81 (2d Cir. 1984) (state prosecutor was immune from damages for issuing capias to secure appearance of key witness for prosecution). *Contra* Crane v. Texas, 759 F.2d 412, 430-31 (5th Cir.), *modified* 766 F.2d 193 (5th Cir.), *cert. denied sub nom.*, Wade v. Crane, 474 U.S. 1020 (1985) (county prosecutor's custom of issuing misdemeanor writs of capias was considered outside statutorily mandated prosecutorial duties and therefore not entitled to absolute immunity for damages).

[97] Mullinax v. McElhenney, 817 F.2d 711, 713-15 (11th Cir. 1987). A county prosecutor, for uncertain motives, attempted several times to entrap a paralegal on narcotics charges. *Id.* at 713-14. After several failed attempts, the prosecutor filed fabricated charges against the paralegal. *Id.* The Court of Appeals of the Eleventh Circuit held a prosecutor was entitled to absolute immunity if he used his judicial power as an instrument to dispose of an unwanted employee. *Id.* at 715. *But see* Fullman v. Graddick, 739 F.2d 553, 558 (11th Cir. 1984) (upholding *Imbler* pronouncement that prosecutor acting in his administrative capacity is absolutely immune).

In one fell swoop, however, *Burns* eradicated inconsistencies regarding the level of immunity applicable to prosecutorial decisions of whether to file charges[98] as well as administrative acts.[99] In addition, *Burns* resolved a confusing trend among federal courts concerning absolute immunity for advice to the police.[100] Most importantly, *Burns* shut down a brief and narrow trail of opinions in the Fourth and Fifth Circuits which extended the absolute immunity doctrine to prosecutors participating in police investigation.

In *Pachaly v. City of Lynchburg*,[101] the plaintiff[102] alleged a city prosecutor, who participated in a search of his offices,[103] violated the plaintiff's clearly established constitutional rights.[104] Under his § 1983 damage suit,[105] the plaintiff contended the prosecutor was entitled only to a qualified immunity defense since the prosecutor functioned as a police officer when the search was conducted.[106] The Court of Ap-

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[98] *See supra* notes 78, 93 and accompanying text.

[99] *See supra* notes 76, 95, 96 and accompanying text.

[100] *See supra* notes 78, 90 and accompanying text.

[101] 897 F.2d 723 (4th Cir. 1990).

[102] *Pachaly*, 897 F.2d at 724-25. The plaintiff, Robert Pachaly, Jr., owned a radio station in Lynchburg, Virginia. *Id.* In March 1986, the plaintiff was indicted on three counts of larceny and one count of assault with a motor vehicle. *Id.* at 725. Warrants were issued for plaintiff's arrest and a search of plaintiff's radio station offices. *Id.*

[103] *Id.* The prosecutor, William G. Petty, was employed as an attorney for the City of Lynchburg. *Id.* at 724. The prosecutor assisted police in securing the search warrant and in conducting the search at the radio station. *Id.* at 725.

[104] *Id.* Prior to the plaintiff's criminal trial, the plaintiff's counsel moved to suppress all items seized subsequent to the search conducted at the radio station. *Id.* Plaintiff's counsel argued that the scope of the warrant was unconstitutionally broad. *Id.* The trial court denied the motion to suppress. *Id.* However, plaintiff was found innocent of two of the larceny charges. *Id.* The remaining larceny charge was not pursued. *Id.* The plaintiff was convicted of assault with a motor vehicle. *Id.*

[105] *Id.* The plaintiff's § 1983 damage suit alleged that the search of his radio station violated his fourth amendment rights under the federal constitution. *Id.* The plaintiff named the prosecutor, the police officer who assisted the prosecutor in the search, the City of Lynchburg, and the Commonwealth of Virginia as defendants. *Id.* at 724.

[106] *Id.* at 727. The plaintiff charged that the prosecutor acted outside the scope of his prosecutorial duties when he searched the plaintiff's offices. *Id.* The plaintiff alleged that the search was investigatory in nature and therefore within the province of the police. *Id.* Therefore, the prosecutor was entitled to not more

peals for the Fourth Circuit stated a prosecutor must undertake some investigation before making an intelligent decision whether to bring charges and, if so, when to launch a prosecution.[107] However, while the court recognized "the distinction between necessary and excessive investigation [is] an extremely clouded one,"[108] the court—in one paragraph, conveniently unbesmirched by case authority—held a prosecutor absolutely immune from § 1983 damages for participation in a search unless "such participation fell squarely beyond the bounds of the public duty to prepare a complete prosecution."[109] Thus, while the court indicated a prosecutor could be stripped of absolute immunity for conducting police work, in light of the stunted and jurisprudentially footloose reasoning of *Pachaly*, it is difficult to imagine what level of conduct would trigger an abdication of absolute immunity.

While the mess made by the Court of Appeals for the Fifth

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immunity than a police officer in the same situation. *Id.* The plaintiff concluded the prosecutor was entitled only to a qualified immunity for constitutional violations occurring during the search. *Id.* The prosecutor, however, countered that the search was a legitimate element of his prosecutorial obligation to gather evidence in the wake of an indictment. *Id.* The prosecutor claimed his absolute immunity from damages extended to the search. *Id.*

[107] *Pachaly*, 897 F.2d at 727. The Court of Appeals for the Fourth Circuit noted that the prosecutor had a duty to obtain, review and evaluate evidence. *Id. Contra* Mullinax v. McElhenney, 817 F. 2d 711, 715 (11th Cir. 1987) (prosecutor stripped of absolute immunity for assisting police in search since prosecutor's function was limited to marshalling evidence obtained by police rather than obtain evidence himself).

[108] *Pachaly*, 897 F.2d at 727. Even though the court noted the distinction between prosecutorial and non-prosecutorial duties is "clouded," it went on to conclude that once it was determined a prosecutor was acting outside of his prosecutorial duties, that prosecutor lost absolute immunity. *Id.* Labored with such fractured analysis, the court succeeds in providing us with the portrait without teaching us how to paint.

[109] *Id.* at 728. Dissenting from this part of the holding, Judge Butzner argued that the prosecutor may have been searching for evidence that would link the plaintiff to crimes other than those for which the plaintiff was indicted. *Id.* at 729 (Butzner, J., dissenting in part). Judge Butzner asserted that a jury could therefore have reasonably determined the prosecutor exceeded the boundaries of his prosecutorial function and stripped his absolute immunity. *Id.* at 729 (Butzner, J., dissenting in part). *Contra* Ginter v. Stallcup, 641 F. Supp. 939, 966 (E.D. Ark. 1986), *modified*, 869 F.2d. 384 (8th Cir. 1989) (prosecutor who elects to assume duties of police officer will be entitled to no more immunity than police officer in execution of these duties).

Circuit regarding prosecutorial immunity may not be as tidy as that created by the Fourth Circuit, it was just as effective. In *Marrero v. City of Hialeah*,[110] the Court of Appeals for the Fifth Circuit held a state prosecutor[111] who joined police in a search[112] of the plaintiff's jewelry store[113] acted outside of his prosecutorial function[114] and was therefore entitled to only qualified immunity.[115] Less than three months earlier, however, the Fifth Circuit decided *Cook v. Houston Post*.[116] In *Cook*, the court held a prosecutor[117] who obtained documents[118] and conducted pre-indictment interviews with potential witnesses[119] remained within his prosecutorial

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[110] 625 F.2d 499 (5th Cir. 1980), *cert. denied*, Rashkind v. Marrero, 450 U.S. 913 (1981).

[111] *Marrero*, 625 F.2d at 502. The prosecutor was Paul Rashkind, an assistant state attorney for Dade County, Florida. *Id.*

[112] *Id.* The police department for the City of Hialeah secured a search warrant to enter and search for stolen items at a jewelry store. *Id.* The search, in which the prosecutor took part, was unsuccessful. *Id.* However, after a robbery victim identified a piece of jewelry in the store as stolen, almost the entire inventory of the store was seized by police and the plaintiffs were placed under arrest. *Id.*

[113] *Id.* at 501-02. The plaintiffs are Juan and Maria Marrero, sole owners and operators of the store. *Id.*

[114] *Id.* at 502. The plaintiffs charged Rashkind willfully and knowingly violated their fourth amendment rights under the federal constitution. *Id.* The district court held Rashkind was absolutely immune from damages for his participation in the search under *Imbler*. *Id.* at 503. On appeal, the plaintiffs maintained Rashkind's search was outside of his prosecutorial function and therefore entitled only to a qualified immunity defense. *Id.*

[115] *Id.* at 505. The Fifth Circuit reversed the district court, holding a search of premises fell outside the sphere of prosecutorial duties and was therefore not entitled to *Imbler* immunity. *Id.* According to the *Marrero* court: "[A] prosecutor who assists, directs or otherwise participates with the police in obtaining evidence prior to an indictment undoubtedly is functioning more in his investigative capacity than in his quasi-judicial capacities[.]" *Id.*

[116] 616 F.2d 791 (5th Cir. 1980).

[117] *Cook*, 616 F.2d at 793. Terry Collins, an assistant district attorney for Harris County, Texas, was sued for damages under § 1983 by Jake Cook, former fire chief for the city of Houston, Texas. *Id.* Cook claimed Collins conspired with several others—including *The Houston Post*—to discredit his administration through grand jury investigation, indictments for misuse and theft of fire department property, and the subsequent media attention given to these indictments. *Id.*

[118] *Id.* at 793. In addition to obtaining records, Cook alleged Collins also swore out grand jury subpoenas. *Id.*

[119] *Id.* at 793. Cook alleged all of this activity was done as part of the conspiracy to undermine his administration. *Id.* Cook was tried and acquitted of charges

function[120] and preserved his absolute immunity.[121] Finally, in *Dayse v. Schuldt*,[122] after explicitly noting the discrepancy caused by *Cook* and *Marrero*,[123] the Fifth Circuit dodged the opportunity to resolve the issue. In an election of form over substance, and (reminiscent of *Pachaly*) without the convenience of any case authority,[124] the Fifth Circuit escaped resolution of the *Cook/Marrero* dilemma, holding a § 1983 plaintiff must plainly nominate at least one constitutional violation against the prosecutor/defendant before the court will consider the merits of the action.[125] As a result, the court never looked past the complaint in *Dayse*.[126] Staring in the face of obvious contradiction, the Fifth Circuit blinked. In the wake of *Burns*, however, the procedural gymnastics of *Dayse* are nugatory.

Burns resolves the confusion that has evolved in the Fourth and Fifth Circuits in much the same way as other circuits have approached prosecutorial immunity when the prosecutor has functioned as an investigator.[127] The Fourth

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stemming from Collins' investigation. *Id.*

[120] *Id.* The court takes all of 63 words to come to this conclusion. *Id.* Further, the court cites no case authority in support of its conclusion. *Id. Contra Marrero*, 625 F.2d at 506 n.8 ("[I]f the activity complained of here does not fall within a prosecutor's investigative role, it is difficult to imagine what conduct would constitute investigative activity on the part of a prosecutor").

[121] *Cook*, 616 F.2d at 793. The *Cook* court relied on the rationale of the district court judge rather than precedent to reach this conclusion. *Id.*

[122] 894 F.2d 170 (5th Cir. 1990).

[123] *Dayse*, 894 F.2d at 172. The court noted the discrepancy, then stated: "Prosecutorial investigation is not invariably cloaked in absolute immunity." *Id.*

[124] *Id.* The court, for no apparent reason, did offer authority for the district court's holding that the plaintiff in *Dayse* had been mooted out of injunctive relief. *Id.*

[125] *Id.* The court noted that Dayse did not allege any violation of a constitutional right by Maness in his investigation. *Id.*

[126] *Id.* at 171-72. In *Dayse*, the plaintiff, an inmate of the Texas Department of Corrections, sued Tom Maness, district attorney for Jefferson County, Texas. *Id.* at 171. The plaintiff, John Dayse, alleged Maness and others conspired to deprive him of an adequate opportunity to defend himself on a charge unrelated to the one for which he was now serving time. *Id.* In particular, Dayse complained Maness unlawfully indicted him. *Id.* at 172.

[127] Mullinax v. McElhenney, 817 F.2d. 711, 715 (11th Cir. 1987). The Court of Appeals for the Eleventh Circuit found that prosecutorial participation in a police search is not properly within the prosecutorial function. *Id.* The court found the

Circuit's slithery holding in *Pachaly* that a prosecutor will maintain absolute immunity from damages for investigations conducted within "the bounds of the public duty to prepare a complete prosecution"[128] is squelched by *Burns*.[129] Additionally, the immunity morass created in the Fifth Circuit under *Dayse*,[130] *Cook*[131] and *Marrero*[132] is remedied by the bright line of *Burns*.[133] As a result of *Burns*, the overzealous, vindictive, or perhaps the just plain malicious prosecutor is certain to retain immunity from § 1983 damages in the only place where such a remedy could ultimately be attained—the courtroom itself.[134]

James Lappan

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prosecutor qualifiedly immune from damages arising out of his non-quasi-judicial activity. *Id.*; *see* Myers v. Morris, 810 F.2d 1437, 1450-51 (8th Cir.) (interview by child-protection prosecutor of children suspected of being abused held absolutely immune from damages since interviews were specialized and therefore necessary to prosecutorial process), *cert. denied*, 484 U.S. 828 (1987). *But see* Rex v. Teeples, 753 F.2d 840, 843-44 (10th Cir.) (prosecutor qualifiedly immune from damages after participating in investigation which leads to involuntary confession), *cert. denied sub nom.*, Johnson v. Rex, 474 U.S. 967 (1985).

[128] *See supra* note 109 and accompanying text.

[129] *See supra* note 79 and accompanying text.

[130] *See supra* note 125 and accompanying text.

[131] *See supra* notes 120, 121 and accompanying text.

[132] *See supra* notes 114, 115 and accompanying text.

[133] *See supra* notes 78, 79 and accompanying text.

[134] On October 5, 1992, the United States Supreme Court granted certiorari in a case from the United States Court of Appeals for the Seventh Circuit which is almost certain to expand or limit the reach of *Burns*. Buckley v. Fitzsimmons, 952 F.2d 965, (7th Cir. 1992), *cert. granted*, 61 U.S.L.W. 3256 (U.S. Oct. 5, 1992) (No. 91-7849). In *Buckley*, the Seventh Circuit held a prosecutor was absolutely immune from damages for false statements uttered at a press conference concerning the actions of an indictee. *Buckley*, 952 F.2d at 966-67. The court also extended immunity to the prosecutor's pre-trial preparation of state expert witnesses. *Id.* The Supreme Court granted certiorari to both issues.

RECENT DECISIONS

CRIMINAL LAW—ENTRAPMENT DEFENSE—WHERE THE GOVERNMENT HAS INDUCED AN INDIVIDUAL TO BREAK THE LAW THE PROSECUTION MUST PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT HAD THE DISPOSITION TO COMMIT THE CRIMINAL ACT PRIOR TO FIRST BEING APPROACHED BY GOVERNMENT AGENTS*

Respondent[1] prosecuted the petitioner[2] in the United States District Court for the District of Nebraska, for receiving child pornography through the mail in violation of the Child Protection Act.[3] After two and one-half years of government solicitation,[4] the petitioner illegally ordered a magazine from

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* Best Casenote Award. Presented by the law firm of Ott, Purdy and Scott of Jackson, Mississippi.

[1] The respondent was the United States. Jacobson v. United States, 112 S. Ct. 1535, 1537 (1992).

[2] *Jacobson*, 112 S. Ct. at 1537. The petitioner was Keith Jacobson. *Id.*

[3] *Id.* at 1540. The Child Protection Act of 1984 provided criminal penalties for the knowing receipt through the mail of any "visual depiction [that] involves the use of a minor engaging in sexually explicit conduct." 18 U.S.C. § 2252(a)(2)(A) (1982 & Supp. II 1984).

[4] *Jacobson*, 112 S. Ct. at 1538. In February 1984, Jacobson ordered a brochure and two magazines from a California adult bookstore that contained photographs of nude preteen and teenage boys. *Id.* at 1537. The receipt of such maga-

undercover agents that depicted nude preteen and teenage boys.[5] Petitioner defended on the ground that the government agents entrapped him into committing the crime.[6] Even though the jury received an instruction on the entrapment defense,[7] the jury convicted the petitioner.[8] The United States Court of Appeals for the Eighth Circuit reversed, but on rehearing *en banc*, affirmed.[9] On writ of certiorari, the United States Supreme Court, *held*, reversed.[10] Where the Government induced an individual to break the law and that

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zines was legal under both federal and state law. *Id.* at 1358. Within three months, Congress enacted the Child Protection Act. *Id.* In the statute's first month of enactment, postal inspectors discovered Jacobson's name on a mailing list of the California bookstore. *Id.* Two federal agencies spent 26 months using fictitious organizations and an undercover pen pal to explore Jacobson's willingness to order sexually explicit photographs of children through the mail. *Id.*

[5] *Id.* at 1539-40. Jacobson responded to the Government's fictitious mailings which claimed to promote sexual freedom and freedom of choice. *Id.* at 1538-39. Jacobson indicated on a sexual attitude questionnaire that pre-teen sex interested him but that he opposed pedophilia. *Id.* at 1538. In March 1987, Jacobson ordered a magazine from federal undercover agents that depicted young boys engaged in various sexual activities. *Id.* at 1540. The police arrested Jacobson after the police delivered a photocopy of the magazine. *Id.* On September 24, 1987, the United States indicted Jacobson. *Id.* at 1537.

[6] *Id.* at 1537. Jacobson contended that he would not have had the necessary predisposition, or mental state, to order child pornography without the Government's repeated mailings and solicitations. *Id.* at 1540.

[7] *Id.* at 1540. The judge instructed the jury that if Jacobson did not intend to commit the crime before contact with the undercover agents and if the agents persuaded or induced Jacobson to commit the crime, then the police entrapped Jacobson. *Id.* at 1540 n.1. However, if Jacobson intended to commit the crime before the government officials contacted him, then the agents did not entrap Jacobson even if they provided him an easier opportunity to commit the crime or participated in the acts of the crime. *Id.*

[8] *Id.* at 1540. The trial court convicted Jacobson of receiving child pornography through the mail in violation of the Child Protection Act. *Id.* at 1537.

[9] *Jacobson*, 112 S. Ct. at 1540. A divided Court of Appeals for the Eighth Circuit, sitting *en banc*, concluded that as a matter of the law the Government had not entrapped Jacobson. *Id.*

[10] *Id.* at 1537. In a split opinion, Justice White wrote the majority opinion and Justice O'Connor wrote the dissenting opinion for the United States Supreme Court. *Id.* The United States Supreme Court reversed the Court of Appeals for the Eighth Circuit's affirmation of the trial court's conviction. *Id.* The United States Supreme Court concluded that the prosecution failed to carry its burden of proof beyond a reasonable doubt that Jacobson had the necessary disposition to violate the law before the Government contacted him. *Id.* at 1543.

individual raised the entrapment defense, the prosecution must prove beyond a reasonable doubt that the defendant's disposition to commit the crime existed before the government agents first contacted the accused. *Jacobson v. United States*, 112 S. Ct. 1535 (1992).

Although English[11] and American courts[12] addressed the issue of entrapment prior to the twentieth century, the United States Supreme Court first established entrapment as an affirmative defense in the 1932 case of *Sorrells v. United States*.[13] In *Sorrells*, the petitioner[14] argued that a government agent had induced him into obtaining illegal liquor and that the trial judge should have instructed the jury on the entrapment defense.[15] The United States Supreme Court agreed, and ruled that the evidence supported the petitioner's request for a jury instruction on entrapment.[16] The Court

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[11] Paul Marcus, *The Development of Entrapment Law*, 33 WAYNE L. REV. 5, 5-9 (1986). The English courts have rejected the entrapment defense. *Id.* at 5-6. In perhaps the first case in which a defendant raised entrapment as a defense, the English court refused to excuse the defendant for robbery. *Id.* at 6 (citing Norden's Case, Fost. Crim. Cas. 129 (1774)); *see also* Regina v. Holden, 127 Eng. Rep. 1107, 1109 (Cr. Cas. Res. 1810) (rejecting entrapment defense when agent purchased forged notes for purpose of prosecution).

[12] Marcus, *supra* note 11, at 9. The Court of Appeals for the Ninth Circuit determined that entrapment constituted a legal defense. Woo Wai v. United States, 223 F. 412, 415-16 (9th Cir. 1915). The court found that public policy prohibited the Government from inducing a defendant to commit a crime. *Id.* at 415; *see also* United States v. Adams, 59 F. 674, 677 (D.C. Or. 1894) (No. 3589) (concluding that defendant did not commit crime because government agents induced him); United States v. Whittier, 28 F. Cas. 591, 594 (C.C.E.D. Mo. 1878) (No. 16,688) (Treat, J., concurring) (condemning entrapment practices by law enforcement agencies); Love v. People, 43 N.E. 710, 713 (Ill. 1896) (reversing burglary conviction on ground that owner consented).

[13] 287 U.S. 435 (1932).

[14] *Sorrells*, 287 U.S. at 435. The petitioner was Sorrells. *Id.* The respondent was the United States. *Id.*

[15] *Id.* at 438. On July 13, 1930, the United States indicted Sorrells for the possession and sale of whiskey in violation of the federal prohibition laws. *Id.* The trial judge denied Sorrells' motion for directed verdict and refused to instruct the jury as to the entrapment defense. *Id.* The Circuit Court of Appeals for the Fourth Circuit affirmed the judgment. *Id.* at 439.

[16] *Id.* at 441. The evidence indicated that a government agent had posed as a tourist and after three attempts, had coaxed Sorrells into obtaining some liquor. *Id.* at 439. Even though witnesses had testified that Sorrells had a repu-

reasoned that public policy prevented the Government from convicting a truly innocent person.[23] Second, the *Sorrells* opinion premised the subjective theory on grounds of statutory construction.[24] Third, the majority invoked estoppel principles when it refused to allow the Government to prosecute a crime it had instigated.[25] Finally, the Court concluded that a defendant could have raised the entrapment defense under a plea of not guilty.[26]

While the majority opinion outlined a judicial test for federal courts, the concurring opinion also had a tremendous impact on the acceptance and application of the entrapment doctrine.[27] Justice Roberts,[28] in his concurring opinion, criti-

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States: *The Propriety of Inconsistency and the Need for Objectivity*, 24 U.S.F. L. REV. 541, 544-45 (1990). The majority stated that the controlling question was "whether the defendant is a person otherwise innocent whom the Government is seeking to punish for an alleged offense which is the product of the creative activity of its own officials." *Sorrells*, 287 U.S. at 451.

[23] *Sorrells*, 287 U.S. at 443-46. The Court felt that the judicial system had to stop the prosecution where the Government induced an otherwise innocent person into committing a crime. *Id.* at 446. The majority contended that it had to prevent such acts in order to protect the Government from illegal acts by its employees and to preserve justice in the courts. *Id.*; *see also* Newman v. United States, 299 F. 128, 131 (4th Cir. 1924) (stating that government decoys are not permissible when used to apprehend person without necessary disposition); Butts v. United States 273 F. 35, 38 (8th Cir. 1921) (concluding that it was unconscionable for Government to entice or persuade defendant into committing criminal acts when defendant never considered such conduct before).

[24] *Sorrells*, 287 U.S. at 448-51. The Court determined that under its statutes, Congress could not have intended the criminal prosecution of acts which the Government had instigated. *Id.* at 448; *see also* United States v. Katz, 271 U.S. 354, 362 (1926) (reasoning that Supreme Court should construe limited interpretation of criminal statutes that would lead to absurd results if read literally).

[25] *Sorrells*, 287 U.S. at 448-49. The majority opinion noted that judicial opinions had estopped the Government from prosecuting cases where the Court had limited the interpretation of legislation. *Id.* at 448.

[26] *Id.* at 452. The Court reasoned that the entrapment defense was available because the prosecution could not have contended that Sorrells was guilty when the government officials instigated his actions. *Id.* The majority opinion noted that federal courts that sustained the entrapment defense held the view that the defendant was not guilty. *Id.*

[27] Marcus, *supra* note 11, at 15. Although *Sorrells* established entrapment as a defense, the primary importance of the decision was that it established the "theoretical underpinning of [the] entrapment doctrine." *Id.* The different views expressed in the majority and concurring opinions reflected the true significance

cized the majority's subjective analysis of an individual's disposition to commit a crime and argued that the test should have focused only on whether the Government's conduct was acceptable.[29] Even though Justice Roberts agreed with the judgment, his concurrence emphasized different justifications[30] for the entrapment defense which divided the judicial and academic communities for years to come.[31]

Twenty-five years later, the United States Supreme Court rejected Justice Roberts' argument for an objective test that focused only on governmental conduct in the case of *Sherman v. United States*.[32] In *Sherman*, the petitioner[33] contended that the undercover agent induced him into purchasing illegal drugs.[34] The United States Supreme Court agreed, and ruled

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of the case in the evolution of the entrapment doctrine. *Id.*

[28] *Sorrels*, 287 U.S. at 453 (Roberts, J., concurring). Justice Roberts, joined by Justices Brandeis and Stone, wrote a concurring opinion. *Id.* at 459 (Roberts, J., concurring).

[29] Schreibstein, *supra* note 22, at 545. In focusing only on the level of governmental activity, the concurrence based the entrapment defense on a strictly objective doctrine. *Id. See generally* People v. Barraza, 591 P.2d 947, 955 (Cal. 1979) (listing jurisdictions that have adopted objective doctrine); Roy M. Cohn, *The Need for an Objective Approach to Prosecutorial Misconduct*, 46 BROOK. L. REV. 249, 264-67 (1980) (discussing need for objective entrapment doctrine); Roger Park, *The Entrapment Controversy*, 60 MINN. L. REV. 163, 167 n.13 (1976) (listing numerous commentaries favoring objective approach).

[30] Laura G. Webster, *Building a Better Mousetrap: Reconstructing Federal Entrapment Theory from* Sorrells *to* Mathews, 32 ARIZ. L. REV. 605, 622-23 (1990). Justice Roberts agreed with the judgment, but the concurring opinion suggested that the Court should have focused on the methods employed by the governmental officials. *Id.* at 622. Justice Roberts reasoned that entrapment rests on the public policy of protecting the Government from its own abuses. Marcus, *supra* note 11, at 18; *cf.* Casey v. United States, 276 U.S. 413, 422-25 (1928) (Brandeis, J., dissenting) (contending that prosecution of defendant that police arrested in sting operation should have failed because agent's conduct went against public policy).

[31] Marcus, *supra* note 11, at 15. The majority and concurring opinions of *Sorrells* clearly outlined the "substantive battle lines" for the controversy over the proper scope of the entrapment doctrine. Schreibstein, *supra* note 22, at 545.

[32] 356 U.S. 369 (1958).

[33] *Sherman*, 356 U.S. at 370. The petitioner was Sherman. *Id.* The respondent was the United States. *Id.*

[34] *Id.* The United States indicted Sherman for the sale of narcotics in violation of federal statutes. *Id.* The issue in *Sherman* was whether the United States Supreme Court should have set aside Sherman's conviction on the ground

that the petitioner established entrapment as a matter of law.[35] The majority of the Court[36] focused on the petitioner's disposition[37] and explicitly refused to redefine the subjective basis of the entrapment doctrine.[38] In an attempt to clarify the subjective view, the majority stated that "[t]o determine whether entrapment has been established, a line must be drawn between the trap for the unwary innocent and the trap for the unwary criminal."[39] Further, the *Sherman* Court firmly rejected the objective view that entrapment was an issue for the judge to decide.[40]

Justice Frankfurter,[41] in a concurring opinion, contended that the lower courts had difficulty in applying the *Sorrells*

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that he established the entrapment defense as matter of law. *Id.*

[35] *Id.* at 373. The Court based its decision on the undisputed testimony of the undercover agent. *Id.* The evidence indicated that the agent met Sherman in a drug rehabilitation program. *Id.* Subsequently, the agent met frequently with Sherman and asked him for drugs. *Id.* Sherman persistently refused the agent's request. *Id.* However, Sherman finally agreed and purchased the narcotics which they both shared. *Id.* The Court noted that the agent had not only instigated the drug purchase but also had induced Sherman to return to his addiction. *Id.*

[36] *Id.* at 370. Chief Justice Warren, for a five-member majority, delivered the opinion of the Court. *Id.*

[37] Marcus, *supra* note 11, at 20. The United States had convicted Sherman for the illegal sale and possession of narcotics in the past. *Sherman*, 356 U.S. at 375-76. However, the majority reasoned that a nine-year old sales conviction and a five-year old possession conviction was insufficient to prove predisposition in light of the fact that the defendant attempted to seek help from a drug rehabilitation program. *Id.* at 375. The Court noted that this case illustrated the evils which the entrapment defense protected against. *Id.* at 376.

[38] *Sherman*, 356 U.S. at 376. The majority noted that the parties did not raise the question of the elements of the subjective theory. *Id.* The Court stated that there was no justification to decide issues not presented by the parties. *Id.*

[39] *Id.* at 372. The majority noted that *Sorrells* had outlined the proper principles to determine if the Government had created the criminal intent of a defendant. *Id.* at 372-73.

[40] *Id.* at 377. The *Sherman* majority stated that *Sorrells* unanimously determined that if the evidence did not support entrapment as a matter of law, then the jury should have decided the issue of entrapment as part of their function of determining guilt or innocence. *Id. See generally* Linda L. Dukes, Comment, *The Entrapment Defense*, 10 AM. J. TRIAL ADVOC. 591, 601-03 (1987) (discussing differences between subjective and objective theories of entrapment).

[41] *Sherman*, 356 U.S. at 378 (Frankfurter, J., concurring). Justice Frankfurter, joined by Justices Douglas, Harlan, and Brennan, wrote the concurring opinion. *Id.* (Frankfurter, J., concurring).

principles.[42] Justice Frankfurter expressed two major criticisms of the predisposition test: 1) that the subjective test failed to develop judicial standards of "proper police conduct,"[43] and 2) that the majority's "legislative intent" theory was a judicial fiction.[44] Once again, the concurring opinion played an important role in the entrapment debate because it heightened the subjective-objective controversy that Justice Roberts advanced in *Sorrells*.[45]

The United States Supreme Court confronted this long-standing dispute over the proper scope of the entrapment doctrine in the case of *United States v. Russell*.[46] In *Russell*, the respondent[47] urged the Court to adopt the Roberts-

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[42] *Id.* at 378-79 (Frankfurter, J., concurring). The concurrence agreed in the judgment but argued against the subjective theory of entrapment. *Id.* at 378 (Frankfurter, J., concurring). Justice Frankfurter noted that lower federal courts basically ignored the subjective doctrine outlined in the *Sorrells* decision. *Id.* at 379 (Frankfurter, J., concurring). Since many of the lower federal courts failed to strictly adhere to *Sorrells*, the concurring opinion suggested that the Court should have reassessed the elements of entrapment. *Id.* (Frankfurter, J., concurring). *See generally* Webster, *supra* note 30, at 614-21 (discussing problems with federal entrapment doctrine).

[43] Marcus, *supra* note 11, at 21. Justice Frankfurter reasoned that a jury verdict would have settled the issue in that particular case only. *Sherman*, 356 U.S. at 385 (Frankfurter, J., concurring). The concurrence implied that only precedent could have developed the necessary guidelines for future governmental conduct with any degree of certainty. *Id.* (Frankfurter, J., concurring).

[44] Marcus, *supra* note 11, at 21. Justice Frankfurter reasoned that the only legislative intent inherent in the statute was "to make criminal precisely the conduct in which the defendant has engaged." *Sherman*, 356 U.S. at 379 (Frankfurter, J., concurring). Furthermore, Justice Frankfurter stated that courts refused to convict entrapped defendants because the United States employed methods that the judicial system could not have justified. *Id.* at 379-80 (Frankfurter, J., concurring); *cf.* Olmstead v. United States, 277 U.S. 438, 470-71 (1928) (Holmes, J., dissenting) (reasoning that it was better to allow some criminals to escape than to allow outrageous governmental conduct).

[45] Marcus, *supra* note 11, at 21. Justice Frankfurter echoed the same views of Justice Roberts in the *Sorrells* decision. *Id.* The concurring opinion's discussion of a threshold limit of acceptable police conduct became the major issue in the next two landmark cases decided by the United States Supreme Court. Schreibstein, *supra* note 22, at 547.

[46] 411 U.S. 423 (1973).

[47] *Russell*, 411 U.S. at 424. The respondent was Russell. *Id.* The petitioner was the United States. *Id.* The United States indicted Russell on three counts of the illegal manufacture, sale, and delivery of narcotics. *Id.* An FBI agent persuaded Russell that he represented an organization that controlled the manufac-

Frankfurter objective standard for the entrapment defense.[48] However, the majority of the Court[49] explicitly declined to reassess the entrapment doctrine established in *Sorrells*.[50] The Court reasoned that the defendant's predisposition constituted the principle element of the entrapment defense.[51] Further, Justice Rehnquist stated that the *Sorrells-Sherman* decisions properly established entrapment as a "relatively limited defense."[52] Also, the respondent argued that the Government's conduct of supplying a chemical used in the manufacturing of methamphetamine violated his right of due process.[53] The *Russell* Court disagreed, and rejected the respondent's argument that the Government's actions constituted a violation of his constitutional rights.[54] Justice Stew-

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turing and distribution of methamphetamine. *Id.* at 425. Subsequently, the agent provided Russell with an essential and difficult to obtain ingredient used in the manufacturing of methamphetamine. *Id.*

[48] *Id.* at 432-33. Russell conceded that he may have had a predisposition to commit the crime. *Id.* at 433. However, Russell contended that the United States Supreme Court should have adopted the objective approach which would have made the essential element of the defense turn upon the governmental conduct. *Id.*

[49] *Id.* at 424. Justice Rehnquist delivered the opinion of the Court for a five member majority. *Id.*

[50] *Id.* at 433. The *Russell* Court noted that the United States Supreme Court had rejected this argument both in *Sorrells* and *Sherman*. *Id.* at 433-34. *See generally* Webster, *supra* note 30, at 624-32 (discussing impact and criticisms of Justice Rehnquist's opinions on federal entrapment doctrine).

[51] *Russell*, 411 U.S. at 433-35. Justice Rehnquist noted that lower federal courts had ignored the *Sorrells* and *Sherman* opinions. *Id.* at 435. However, Justice Rehnquist stated that "the defense of entrapment enunciated in those opinions was not intended to give the federal judiciary a 'chancellor's foot' veto over law enforcement practices of which it did not approve." *Id.*

[52] *Id.* at 435. Justice Rehnquist reiterated that the Court based the defense on the notion that Congress could not have intended to prosecute an individual whom the Government had induced to commit the crime. *Id.*

[53] *Id.* at 430. Russell argued that the Government's involvement in the manufacturing of the drugs was so high that a criminal prosecution violated his fundamental rights. *Id.* The majority opinion noted that the Court had allowed undercover operations in cases where the defendant's argument for violation of constitutional rights was more pervasive. *Id.* at 435-36. *See generally* Lewis v. United States, 385 U.S. 206, 210-11 (1966) (concluding that undercover agent who entered defendant's home to purchase narcotics did not offend constitutional rights); Osborn v. United States, 385 U.S. 323, 331-33 (1966) (finding that governmental act of wiretapping was permissible).

[54] *Russell*, 411 U.S. at 431-32. The majority reasoned that the Government

art, in a dissenting opinion,[55] contended that a fundamental flaw existed in the majority's focus on predisposition.[56] Further, the dissenting opinion suggested that previously convicted defendants remained particularly vulnerable to governmental prosecution.[57] While the majority opinion conceded that outrageous governmental conduct could have warranted a discussion of due process principles in the future, the Court failed to address what judicial standards would have applied in such cases.[58]

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had supplied a product that by itself was harmless and legal. *Id.* at 432. The Court stated that the evidence indicated that Russell could have obtained the chemical without any governmental assistance. *Id.* The majority opinion concluded that the Government's actions stopped far short of violating Russell's fundamental rights as mandated by the Due Process Clause of the Fifth Amendment. *Id. See generally* Kinsella v. United States, 361 U.S. 234, 246 (1960) (concluding that due process was that "fundamental fairness, shocking to the universal sense of justice").

[55] *Russell*, 411 U.S. at 439 (Stewart, J., dissenting). Justice Stewart, with whom Justices Brennan and Marshall joined, wrote a dissenting opinion. *Id.* (Stewart, J., dissenting). Justice Douglas, with whom Justice Brennan joined, wrote a separate dissenting opinion that called for an objective theory that focused solely on the Government's conduct. *Id.* at 436-37 (Douglas, J., dissenting). The minority opinions in *Russell* illustrated that the intense disagreement had heightened among the justices of the Court because for the first time, the Court's majority holding in an entrapment case had generated dissenting opinions. Webster, *supra* note 30, at 625.

[56] Schreibstein, *supra* note 22, at 548. Justice Stewart stated that the defendant committed an act that Congress had determined to be illegal. *Russell*, 411 U.S. at 442 (Stewart, J., dissenting). Further, the dissenting opinion believed that the defendant proved that he had the predisposition when he committed the crime. *Id.* (Stewart, J., dissenting).

[57] *Schreibstein*, *supra* note 22, at 548-49. Justice Stewart reasoned that the subjective approach had the direct effect of making the police conduct dependent upon the past record of the particular defendant involved. *Russell*, 411 U.S. at 443-44 (Stewart, J., dissenting). Justice Stewart concluded that the subjective theory allowed the Government "to entrap a person with a criminal record or bad reputation, and then to prosecute him . . . confident that his record or reputation itself will be enough to show that he was predisposed to commit the offense anyway." *Id.* (Stewart, J., dissenting).

[58] Schreibstein, *supra* note 22, at 548. The majority opinion did not completely rule out a constitutional defense, but the Court refused to analyze any hypothetical situation that was not before the Court. *Id. But cf.* Joseph B. Ehrlich, Sorrells - *Entrapment or Due Process? A Redefinement of the Entrapment Defense* (pts. 1 & 2) 55 N.Y. ST. BAR J. 33, 42 (1983) (arguing that entrapment was due process); Comment, *The Viability of the Entrapment Defense in the Constitutional Context*, 59 IOWA L. REV. 655, 656-83 (1974) (discussing entrapment defense in

Three years later, the United States Supreme Court again addressed the issue of a due process defense in the case of *Hampton v. United States*.[59] In *Hampton*, the petitioner[60] argued that the Government violated his due process rights when a government informant provided an illegal drug which he subsequently sold to undercover agents.[61] The plurality opinion[62] disagreed, and further sought to restrict the due process defense discussed in *Russell*.[63] Justice Rehnquist concluded that the proper remedy for outrageous police conduct was to prosecute the individual officials under the applicable provisions of state or federal law.[64] In an attempt to unequiv-

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relation to due process principles).

[59] 425 U.S. 484 (1976).

[60] *Hampton*, 425 U.S. at 485. The petitioner was Hampton. *Id.* The respondent was the United States. *Id.* The United States indicted Hampton for the distribution of narcotics. *Id.* The police arrested Hampton after he sold heroin to an undercover agent. *Id.* at 486. Ironically, Hampton had purchased the heroin that he subsequently sold to agents from a government informant. *Id.* at 487.

[61] *Id.* at 489. Hampton alleged that the informant had entrapped him into selling the drugs to the undercover agents. *Id.* at 487-88. Hampton relied on the language in *Russell* that the Court may someday have recognized outrageous governmental conduct that would have barred the Government from prosecuting a defendant. *Id.* at 489. Hampton contended that the Government's conduct in this instance constituted such a case. *Id.* Also, Hampton argued that he neither intended to sell the drugs nor knew that the drugs were heroin. *Id.* at 487. The informant's testimony contradicted Hampton's testimony. *Id.* at 486-87.

[62] *Id.* at 485. Justice Rehnquist, with whom Chief Justice Warren and Justice White joined, wrote the plurality opinion of the Court. *Id.*

[63] Schreibstein, *supra* note 22, at 549. The plurality opinion concluded that the police conduct had not deprived Hampton of any right secured by the Constitution. *Hampton*, 425 U.S. at 490-91. The Court considerably narrowed the defense of entrapment and the chances for a viable due process defense in both *Russell* and *Hampton*. Bennett L. Gershman, *Entrapment, Shocked Consciences, and the Staged Arrest*, 66 MINN. L. REV. 567, 587-88 (1982). Justice Brennan, in his dissenting opinion, concluded that since the police provided the contraband, i.e., an illegal drug, then the Government's conduct reached an unacceptable and outrageous level. *Hampton*, 425 U.S. at 497 (Brennan, J., dissenting); *see* United States v. West, 511 F.2d 1083, 1086 (3d Cir. 1975) (concluding that governmental conduct passed point of toleration where informant knowingly introduced defendant to undercover agent); United States v. Bueno, 447 F.2d 903, 906 (5th Cir. 1971) (holding that court could not convict defendant where government informer sold drugs to defendant, only to have defendant sell them back to undercover agent), *cert. denied*, 411 U.S. 949 (1973). *See generally* Park, *supra* note 29, at 190-95 (discussing aspects of "furnishing-contraband" defense).

[64] *Hampton*, 425 U.S. at 490. Justice Rehnquist reasoned that when the

ocally dismiss the objective theory,[65] Justice Rehnquist stated that the United States Supreme Court previously "ruled out the possibility that the defense of entrapment could ever be based upon governmental misconduct . . . where the predisposition of the defendant to commit the crime was established."[66] Again, the *Hampton* Court failed to adopt clear judicial guidelines and consequently, the concept of a viable due process defense remained vague and unresolved.[67]

After *Hampton*, another issue that centered on whether a defendant could have pleaded entrapment concurrently with other inconsistent defenses emerged into the forefront of the entrapment controversy.[68] The United States Supreme Court

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police engaged in illegal practices, then the proper judicial remedy was not to free an equally culpable defendant. *Id.*; *see* Imbler v. Pachtman, 424 U.S. 409, 428-29 (1976) (determining that civil immunity for government officials did not place them beyond reaches of criminal law).

[65] Kenneth M. Murchison, *The Entrapment Defense in Federal Courts: Modern Developments*, 47 MISS. L. J. 573, 602 (1976). The plurality opinion made a determined effort to rid the entrapment doctrine of any objective theoretical basis. *Id.* Again, the dissenting opinion argued that the Court should have adopted the objective theory of entrapment that focused only on the level of governmental conduct. *Hampton*, 425 U.S. at 496-97 (Brennan, J., dissenting). Further, Justice Brennan contended that under the subjective analysis, the petitioner established entrapment as a matter of law. *Id.* at 497-99 (Brennan, J., dissenting).

[66] *Hampton*, 425 U.S. at 488-89. The plurality opinion reaffirmed the theory that the entrapment defense turned upon the defendant's predisposition and not the Government's conduct. *Id.* at 488. Justice Powell, in a concurring opinion, reasoned that Justice Rehnquist's opinion eliminated any possibility of a due process defense. *Id.* at 491 (Powell, J., concurring). Justice Powell agreed with the conviction and the focus on the defendant's predisposition. *Id.* at 491-93 (Powell, J., concurring). However, Justice Powell preferred to leave the due process question open, and to retain the Court's "supervisory power to bar a conviction of a predisposed defendant because of outrageous police conduct." *Id.* at 493 (Powell, J., concurring). *See generally* United States v. Kelly, 748 F.2d 691, 698 (D.C. Cir. 1984) (concluding that inducement element requires objective inquiry into Government's conduct); United States v. Twigg, 588 F.2d 373, 378-79 (3d Cir. 1978) (concluding that justice required court to overturn defendant's conviction because of outrageous police conduct, even though prosecution proved predisposition which barred entrapment defense).

[67] Schreibstein, *supra* note 22, at 552. After *Hampton*, the due process defense remained as an uncertain alternative to the entrapment defense for a defendant who had a past criminal record. *Id.*; *see also* Marcus, *supra* note 11, at 27-29 (contending that *Hampton* decision was ambiguous as to due process defense).

[68] Schreibstein, *supra* note 22, at 552-55. At least four separate views existed

established its position on this issue in the case of *Mathews v. United States*.[69] In *Mathews*, the respondent[70] contended that the courts should not have allowed a defendant to raise the entrapment defense when he denied the commission of each element of the crime.[71] The United States Supreme Court disagreed and held that a defendant could have raised the entrapment defense in conjunction with other inconsistent defenses.[72] The *Mathews* Court reasoned that inconsistent defenses would not necessarily have caused the petitioner to

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in the federal circuit courts as to whether a defendant could have raised the entrapment defense along with other defenses. *Id.* at 552; *see, e.g.*, United States v. Henry, 749 F.2d 203, 213 (5th Cir. 1984) (en banc) (arguing that court could not have forced defendant to forego entrapment plea if he denied commission of crime); United States v. Liparota, 735 F.2d 1044, 1047-48 (7th Cir. 1984) (contending that defendant must have admitted every element of crime in order to raise entrapment defense), *rev'd on other grounds*, 471 U.S. 419 (1985); United States v. Haimowitz, 725 F.2d 1561, 1573-74 (11th Cir.) (concluding that defendant could have raised entrapment and have denied elements of crime if prosecution admitted substantial evidence in trial that could show entrapment), *cert. denied*, 469 U.S. 1072 (1984); United States v. Annese, 631 F.2d 1041, 1046-47 (1st Cir. 1980) (determining that admission of crime was not precondition to entrapment defense); United States v. Baker, 373 F.2d 28, 30 (6th Cir. 1967) (explaining that defendant could have disputed *mens rea* and have raised entrapment defense concurrently).

[69] 485 U.S. 58 (1988).

[70] *Mathews*, 485 U.S. at 60. The respondent was the United States. *Id.* The petitioner was Mathews. *Id.*

[71] *Id.* at 63. The Government insisted that entrapment presupposed the commission of the crime. *Id.* Therefore, the prosecution contended that a jury could not have determined that the defendant failed to commit the elements of the crime and, at the same time, have determined that the Government entrapped him. *Id.*

[72] *Id.* at 63-64. The Court noted that precedent established that a defendant could have raised inconsistent defenses. *Id.*; *see* Stevenson v. United States, 162 U.S. 313, 323 (1896) (concluding that during murder trial, defendant could have requested jury instructions on both manslaughter and self-defense); United States v. Demma, 523 F.2d 981, 985 (9th Cir. 1975) (en banc) (holding that defendant could have denied acts and other elements of crime and at same time have claimed entrapment); Johnson v. United States, 426 F.2d 651, 656 (D.C. Cir. 1970) (explaining that defendant in rape trial could have argued both that he did not have sex with victim and that victim consented), *cert. dismissed*, 401 U.S. 846 (1971); Womack v. United States, 336 F.2d 959, 960 (D.C. Cir. 1964) (determining that trial court should have instructed jury on defense when robbery charge based on lack of culpability due to intoxication even though defendant denied intoxication).

commit perjury.[73] The Court noted that perjury was prevalent in civil cases, yet the Federal Rules of Civil Procedure expressly provided for inconsistent defenses.[74] In addition, the *Mathews* Court finally settled the argument over the proper scope of a valid entrapment defense in favor of a subjective test that focused on two elements: 1) government inducement of the crime and 2) lack of predisposition on the part of a defendant to engage in the criminal conduct.[75]

In the instant case, the United States Supreme Court acknowledged that since law enforcement agents encountered difficulty in the prevention of certain crimes,[76] an undercover operation was an appropriate strategy of law enforcement.[77] However, as to the facts of the case at hand, the Court reasoned that since the agents did more than simply provide the petitioner with an opportunity to commit the crime,[78] the

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[73] *Mathews*, 485 U.S. at 65. Chief Justice Rehnquist reasoned that the defendant could have argued that he had not intended to commit the crime. *Id.* While, the defendant's attorney could have argued that if the jury determined otherwise, then they should have considered whether the Government's conduct created his intent. *Id.* Justice Rehnquist suggested that the jury could have considered the inconsistencies, but the defendant would not necessarily have lied on the stand. *Id.*; *cf.* Masciale v. United States, 356 U.S. 386, 388 (1958) (explaining that even though government informant did not testify, jury entitled to disbelieve defendant's entrapment testimony).

[74] *Mathews*, 485 U.S. at 64. The Federal Rules of Civil Procedure provided in relevant part: "A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal, equitable, or maritime grounds." FED. R. CIV. P. 8(e)(2).

[75] Schreibstein, *supra* note 22, at 569. The Court noted that the parties had agreed to the underlying elements of the entrapment defense. *Mathews*, 485 U.S. at 62-63. The majority opinion then concluded that predisposition was the primary element of the entrapment defense. *Id. See generally* Paul Marcus, *Proving Entrapment Under the Predisposition Test*, 14 AM. J. CRIM. L. 53, 68-74 (1987) (analyzing procedural elements of proving entrapment under federal doctrine). Justice Brennan, in concurrence, recanted his objective views of the entrapment defense by stating that "the Court has spoken definitely on [the proper basis for entrapment]. Therefore I bow to *stare decisis*, and today join the judgment and reasoning of the Court. *Mathews*, 485 U.S. at 67 (Brennan, J., concurring).

[76] Jacobson v. United States, 112 S. Ct. 1535, 1540 (1992). The Court acknowledged that child pornography laws were difficult to enforce. *Id.*

[77] *Jacobson*, 112 S. Ct. at 1540. The Court concluded that it is well settled that law enforcement may use undercover agents to apprehend individuals engaged in criminal activities. *Id.* The Court stated that the use of undercover agents alone was not entrapment. *Id.* at 1541.

[78] *Id.* at 1541. The Court concluded that undercover agents "may not origi-

petitioner's predisposition was not independent of the Government's investigation.[79] The Court determined that the Government's zeal for obtaining convictions lead to the arrest of an otherwise innocent person; therefore, the proper remedy was for the Court to intervene.[80] Consequently, the Court reversed and held that the prosecution failed,[81] as a matter of law, to prove that the petitioner's predisposition was present prior to the Government's initial contact[82] and that the trial court's conviction was improper.[83]

In a dissenting opinion, Justice O'Connor[84] stated that

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nate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act, and then induce commission of the crime so that the Government may prosecute." *Id.* at 1540.

[79] *Id.* at 1541. The Court reasoned that although Jacobson had the predisposition to commit the crime by May of 1987, the Government's repeated communications and mailings directly induced Jacobson to order the illegal magazine. *Id.*

[80] *Id.* at 1543. The Court determined that it was proper to reverse Jacobson's conviction. *Id.*

[81] *Id.* The Court placed the prosecution's evidence into two categories: evidence developed prior to the Government's contact with Jacobson, and evidence developed during the investigation. *Id.* at 1541. The Court determined that the pre-investigation evidence consisted only of Jacobson's 1984 order, hence it was of little probative value regarding Jacobson's predisposition. *Id.* The majority opinion reasoned that Jacobson's 1984 order indicated only a general inclination to view sexually-oriented photographs. *Id.* at 1542. The Court concluded that an individual's inclination was beyond the reach of Government. *Id.* Furthermore, the Court added that the 1984 order was legal at the time. *Id.* at 1541. The Court noted that even then the magazine that depicted nude minors shocked Jacobson. *Id.* at 1542. The Court determined that "[e]vidence . . . to do what once was lawful is not, by itself, sufficient to show predisposition to do what is now illegal, for there is a common understanding that most people obey the law even when they disapprove of it." *Id.*

[82] *Jacobson*, 112 S. Ct. at 1543. The majority opinion concluded that the evidence gathered throughout the investigation was also insufficient to carry the prosecution's burden of proof. *Id.* at 1542. The Court found that Jacobson's responses to the mailings proved only an inclination to view photographs of nude children. *Id.* The majority opinion noted that its ruling did not require the prosecution to prove that Jacobson knowingly violated the law. *Id.* at 1542 n.3. The Court reasoned that the organizations' efforts to promote sexual freedom and prevent censorship raised Jacobson's curiosity in the illegal materials and pressured him into obtaining these materials. *Id.* at 1542.

[83] *Id.* at 1543. The majority of the Court concluded that the prosecution had to prove the disposition element beyond a reasonable doubt. *Id.* The Court noted that the prosecution admitted in oral arguments that the law required predisposition prior to governmental contact with the accused. *Id.* at 1541 n.2.

[84] *Id.* at 1543 (O'Connor, J., dissenting). Justice O'Connor, joined by Chief

since past cases supported a rule that required the Court to assess an individual's predisposition at the time the government agents first suggested the crime, the majority redefined "predisposition" and introduced a new requirement to undercover operations.[85] Justice O'Connor reasoned that the majority's ruling considerably changed case law precedent[86] when it concluded that the Government's conduct created the petitioner's predisposition.[87] Furthermore, Justice O'Connor implied that since the judge properly instructed the jury on

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Justice Rehnquist and Justice Kennedy, and with whom Justice Scalia joined in part, wrote a dissenting opinion. *Id.* (O'Connor, J., dissenting). The dissent objected to the majority's conclusion that the jury erred in finding that Jacobson's predisposition existed prior to the initial contact. *Id.* at 1543-44 (O'Connor, J., dissenting).

[85] *Id.* at 1543-44 (O'Connor, J., dissenting). Justice O'Connor stated that the Court invented the requirement that undercover agents must have a reasonable suspicion of predisposition even before an initial contact with the individual. *Id.* at 1544 (O'Connor, J., dissenting). The dissenting opinion suggested that the Government would have misinterpreted the Court's ruling to prohibit the future advertising of "the seductions of criminal activity" as part of sting operations for fear of creating a predisposition in its suspects. *Id.* at 1545 (O'Connor, J., dissenting).

[86] *Id.* at 1545 (O'Connor, J., dissenting). Justice O'Connor determined that the majority's new rule adversely affected undercover operations. *Id.* (O'Connor, J., dissenting). The dissent reasoned that after this case a defendant "will claim that something the [g]overnment agent did before soliciting the crime 'created' a predisposition that was not there before." *Id.* (O'Connor, J., dissenting). Justice O'Connor concluded that the majority's ruling failed to distinguish between governmental conduct that highlighted the temptation of the crime and governmental conduct that coerced Jacobson to commit the crime. *Id.* at 1545-46 (O'Connor, J., dissenting). Also, the dissent implied that the majority ignored Congress' judgment in that specific intent was not an element of the crime. *Id.* at 1546. (O'Connor, J., dissenting). Justice O'Connor stated that the Court's analysis required that the prosecution prove more to establish predisposition than to convict Jacobson. *Id.* (O'Connor, J., dissenting).

[87] *Jacobson,* 112 S. Ct. at 1545 (O'Connor, J., dissenting). Justice O'Connor stated that the Court's holding changed the entrapment doctrine. *Id.* (O'Connor, J., dissenting). The dissent acknowledged that the Government's questionnaires and letters alone were not sufficient to establish Jacobson's predisposition. *Id.* (O'Connor, J., dissenting). However, Justice O'Connor's dissent reasoned that Jacobson's responses to communications before the criminal act indicated his willingness to view photographs of nude children. *Id.* at 1546 (O'Connor, J., dissenting). The dissent concluded that Jacobson's inclination to view such materials established a predisposition to engage in the illegal act. *Id.* (O'Connor, J., dissenting).

the entrapment defense,[88] the majority improperly overturned the trial court's conviction.[89]

The United States Supreme Court's decision in *Jacobson* follows clear precedent in its application of a subjective test for the entrapment defense.[90] However, the majority appears to redefine the predisposition element by imposing a greater burden on the Government to prove that a defendant had the disposition to violate a law prior to any governmental involvement.[91] This will cause uncertainty and adversely affect future undercover operations.[92] Ironically, although the Government must prove prior disposition, the majority's ruling appears to present law enforcement officials with the formidable responsibility of obtaining sufficient evidence of an individual's predisposition to commit a crime even before government officials contact a suspect.[93] Thus, the *Jacobson* decision appears to limit the Government's use of undercover operations without suggesting any guidelines for law enforcement officials to follow.[94] As Justice O'Connor's dissent points out, successful sting operations depend on the Government's ability to suggest criminal activity to suspects in order to gauge their willingness to commit a crime.[95] Therefore, the majority's opinion severely restricts the Government's ability to solicit criminal behavior in undercover operations because this decision offers defendants the opportunity to claim that the Government did or said something to create the disposition which did not exist before.[96] In determining whether the Government's conduct is proper in sting

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[88] *Id.* at 1547 (O'Connor, J., dissenting). The dissenting opinion stated that the jury was ultimately responsible to determine if Jacobson willingly participated in the criminal act. *Id.* (O'Connor, J., dissenting).

[89] *Id.* (O'Connor, J., dissenting). Justice O'Connor stated that the evidence adequately supported the jury's conviction. *Id.* (O'Connor, J., dissenting).

[90] *See supra* notes 21, 39, 52, 65, 75 and accompanying text.

[91] *Id.*

[92] *See supra* notes 51, 64, 75, 84, 86 and accompanying text.

[93] *See supra* notes 81-84 and accompanying text.

[94] *See supra* notes 43, 54, 58, 63, 67 and accompanying text.

[95] *See supra* notes 85, 87 and accompanying text.

[96] *See supra* note 86 and accompanying text.

operations, the United States Supreme Court faces a balancing test which protects otherwise innocent citizens from governmental abuses, yet ensures the effective apprehension of the truly criminal.[97] Perhaps, the United States Supreme Court could have avoided the adverse effect on future undercover operations if it had adopted the due process defense that the majority of justices favored in earlier entrapment cases.[98] However, in its zeal to protect the innocent, the *Jacobson* Court opted to restrict the Government's use of future undercover operations.[99]

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[97] *See supra* notes 22, 39 and accompanying text.

[98] *See supra* notes 58, 61, 63, 66 and accompanying text.

[99] *See supra* notes 43, 54, 58, 63, 67 and accompanying text.

CONSTITUTIONAL LAW—EQUAL PROTECTION—RACE BASED PEREMPTORY CHALLENGE EXCLUSIONS NO LONGER PERMITTED IN CIVIL TRIALS

Petitioner[1] filed a civil suit in the United States District Court for the Western District of Louisiana against the respondent[2] seeking damages[3] for negligence.[4] During voir dire, the respondent used two of his three peremptory challenges[5] to strike black persons from the jury[6] and petitioner objected.[7] The district court overruled the petitioner's objection.[8] An en banc panel[9] of the United States Court of Ap-

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[1] Petitioner, Thaddeus Donald Edmonson, a black construction worker, sustained injuries on his job at a federal enclave in Fort Polk, Louisiana. Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2080 (1991).

[2] *Id.* Respondent, Leesville Concrete Company (Leesville Concrete), operated trucks and other types of equipment at the construction site where petitioner's injuries occurred. *Id.*

[3] *Id.* at 2081. The jury awarded Edmonson damages in the amount of $90,000. *Id.* The jury also found that Edmonson was 80% at fault and reduced the amount of his award to $18,000. *Id.*

[4] *Id.* at 2080. Edmonson alleged that one of Leesville Concrete's employees was negligent when that employee allowed one of its trucks to roll backwards and pin Edmonson against a piece of construction equipment. *Id.*

[5] *Id.* at 2081. Federal law provided each party in a civil case with three peremptory challenges. *Id.* at 2083.

[6] *Edmonson*, 111 S. Ct. at 2081. The impaneled jury consisted of 11 white members and one black member. *Id.*

[7] *Id.* Edmonson requested that the district court require Leesville Concrete to articulate a race-neutral explanation for using two of its peremptory challenges to exclude prospective black jurors. *Id.*

[8] *Id.* The district court concluded that a litigant in a civil trial was free from the restrictions that confined the government in a criminal case. *Id.*

[9] *Id.* A panel of the Court of Appeals for the Fifth Circuit disagreed with the conclusions of the district court. *Id.* The court held that the private parties in a civil case became state actors when they utilized peremptory challenges. *Id.* The court reasoned that to allow peremptory challenges to be used in this manner constituted the State's tolerance of racial discrimination and violated the equal protection component of the Fifth Amendment to the Constitution. *Id.* The court then remanded the case to determine whether Edmonson established a prima facie case of racial discrimination. *Id.* After the ruling of the Fifth Circuit panel, the United States Court of Appeals for the Fifth Circuit ordered a rehearing en banc. *Id.*

peals for the Fifth Circuit affirmed the ruling of the district court.[10] On writ of certiorari, the United States Supreme Court, *held*, reversed and remanded.[11] Where a civil litigant used a peremptory challenge to exclude a prospective juror solely on the basis of race, this act of discrimination violated the equal protection component of the Fifth Amendment's Due Process Clause. *Edmonson v. Leesville Concrete Co.*, 111 S. Ct. 2077 (1991).

Peremptory challenges originated in the common law courts of England.[12] The use of peremptory challenges in the English common law provided the basic foundation for the peremptory challenge system in the United States.[13] Although many commentators severely criticized peremptory challenges,[14] these challenges became a vital part of the

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[10] *Id.* The en banc panel reversed the Fifth Circuit's previous holding and affirmed the decision of the district court. *Id.* The en banc panel concluded that a private party in a civil case was free to use peremptory challenges for any reason, including one based upon the color of the prospective juror's skin. *Id.*

[11] *Edmonson*, 111 S. Ct. at 2081. The United States Supreme Court granted certiorari to resolve the issue of whether a private party in a civil case could use peremptory challenges to strike prospective jurors solely on the basis of race. *Id.* A majority of the Court ruled that a litigant in a civil case was a state actor when he exercised a peremptory challenge. *Id.* As a result, the Court prohibited a private litigant in a civil case from using a peremptory challenge to strike a person from a jury solely on the basis of race. *Id.* The Court also remanded the case to the district court to consider if Edmonson established a prima facie case of racial discrimination. *Id.* at 2088.

[12] JON M. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS 147 (1977). Prior to 1305, the Crown selected every person who served on a jury. *Id.* In 1305, the English Parliament passed a statute that limited the Crown's complete control of the jury selection process. *Id.* The statute permitted the Crown to exclude a juror only for "cause certain." *Id.* This statute also granted a criminal defendant 35 peremptory challenges. *Id.* The English government has now reduced the number of peremptory challenges to seven. *Id.* at 148.

[13] Jere W. Morehead, *Prohibiting Race-Based Peremptory Challenges: Should the Principle of Equal Protection Be Extended to Private Litigants?*, 65 TUL. L. REV. 833, 836 (1991). The United States copied the English common law and granted each criminal defendant 35 peremptory challenges. *Id.* Soon the use of peremptory challenges in the United States far exceeded their use in England. *Id.* The reason for this was that the American judicial system developed an extensive practice of voir dire. *Id.* The American courts, unlike the English courts, also allowed peremptory challenges in federal civil cases. *Id.*

[14] Evan A. Evans, *Recommendations for Reforms in Criminal Procedure*, 24 ILL. L. REV. 112, 113-14 (1929). The use of peremptory challenges wasted more

American judicial system.[15] A number of cases held that the establishment of a fair system of justice required the elimination of racial discrimination from the jury selection process.[16] The United States Supreme Court first pronounced this fundamental axiom of American justice in *Strauder v. West Virginia*.[17] The *Strauder* Court held that a West Virginia statute which prohibited blacks from serving as jurors[18] was a violation of the Equal Protection Clause of the Fourteenth Amendment.[19] The Court noted that the reason for enacting the Fourteenth Amendment[20] was to protect the country's black citizens from purposeful discrimination by the government.[21] While the Fourteenth Amendment made no attempt to enu-

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time than any other aspect of the judicial process. *Id.* Peremptory challenges often excluded the most qualified persons from jury service. *Id.*; *see Proposed Legislation for Jury Reform in New York*, 30 COLUM. L. REV. 721, 726 (1930) (criticizing peremptory challenges because they gave too many rights to criminal defendants).

[15] Lewis v. United States, 146 U.S. 370, 376 (1892). As a result of their long history of public acceptance, peremptory challenges were an essential element in a fair trial by jury. *Id.*

[16] Neal v. Delaware, 103 U.S. 370, 375-76 (1880). The Supreme Court ruled that excluding a black person from the judicial process denied him equal protection under the law. *Id.* The exclusion of black persons meant that white persons enjoyed a superior position in society. *Id.*; *see* Vasquez v. Hillery, 474 U.S. 254, 263 (1986) (stating that discrimination in jury selection undermined integrity of entire judicial process); Patton v. Mississippi, 332 U.S. 463, 469 (1947) (holding that where jury selection process discriminated against black persons, verdict was invalid).

[17] 100 U.S. 303 (1880).

[18] *Strauder*, 100 U.S. at 305. The statute stated that only white males over 21 years of age qualified to be a juror in West Virginia. *Id.*

[19] *Id.* at 310. The Court expressed the view that clearly the aim of the Equal Protection Clause was to ensure equal treatment to all people by the government. *Id.*

[20] *Id.* at 306. The Supreme Court stated that there were two purposes for the enactment of the Fourteenth Amendment. *Id.* The first reason was to ensure that black citizens enjoyed the same rights as white citizens. *Id.* The second reason was to protect black citizens from the infringement of these rights by the State. *Id.*

[21] *Id.* at 309. The *Strauder* Court explained that only the actions of the State invoked the provisions of the Equal Protection Clause. *Id.*; *see* Chad Murdock, Note, Edmonson v. Leesville Concrete Co.: *State Action or Inaction—Does it Matter?*, 23 AKRON L. REV. 73, 79 (1989) (arguing that Equal Protection Clause of Fourteenth Amendment applied only to actions attributable to government).

merate the rights that it sought to protect,[22] the Supreme Court suggested a very broad and liberal reading of these rights.[23] Further, the Court stated that even though the Fourteenth Amendment prohibited a statute that excluded black persons from serving on a jury,[24] the Constitution required no more than the prevention of purposeful discrimination against black persons.[25] Finally, the Supreme Court ruled that the Fourteenth Amendment did not preclude the states from setting certain minimum standards for jurors, as long as race was not one of the qualifications.[26]

The Supreme Court first applied the equal protection principles of *Strauder* to the use of peremptory challenges in *Swain v. Alabama*.[27] In *Swain*, a black defendant challenged a prosecutor's use of peremptory challenges to exclude black persons from the jury.[28] The Court held that the prosecutor's

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[22] *Strauder*, 100 U.S. at 310. The Constitution spoke in general terms which were as comprehensive as possible. *Id.* The language of the Constitution was prohibitory, but each prohibition implied the existence of a right or an immunity. *Id.* One of these rights was that equal protection under the law applied to all citizens. *Id.*

[23] *Id.* at 307. The Court suggested that the framers of the Constitution intended a very broad interpretation of its provisions. *Id.*

[24] *Id.* at 308. The Supreme Court concluded that a statute which prevented black persons from serving on a jury was, without a doubt, discriminatory. *Id.* A statute such as the one in West Virginia certainly denied black persons equal protection under the law. *Id.* at 309. This type of statute branded black citizens as inferior to white citizens. *Id.* at 308.

[25] *Id.* at 309. The Constitution required only that the State provide a black person a fair opportunity to serve on a jury. *Id.*; *see* Cassell v. Texas, 339 U.S. 282, 286 (1950) (holding that Constitution required only fair jury selection process without racial discrimination); Akins v. Texas, 325 U.S. 398, 403 (1945) (stating that equal protection did not entitle criminal defendant to jury that contained members of his own race).

[26] *Strauder*, 100 U.S. at 310. A state had the authority to prescribe the basic qualifications for persons serving as jurors. *Id.* The Court noted that this type of statute was necessary, even though it excluded some people from serving as jurors. *Id.*; *see* Carter v. Jury Comm'n of Greene County, 396 U.S. 320, 332 (1970) (holding that states could limit jurors on qualifications of age, education, intelligence, and moral character); Brown v. Allen, 344 U.S. 443, 473 (1953) (noting that absent racial discrimination, any standard for juror qualification was valid).

[27] 380 U.S. 202 (1965), *overruled by* Batson v. Kentucky, 476 U.S. 79, 93 (1986).

[28] *Swain*, 380 U.S. at 203. In *Swain*, a black criminal defendant claimed a violation of the Equal Protection Clause because the prosecutor used peremptory

use of his peremptory challenges to strike prospective black jurors did not violate any of the defendant's constitutional rights.[29] Consequently, the Court rejected the defendant's argument that the Constitution required a prosecutor to give a race-neutral explanation for using his peremptory challenges[30] to strike potential black jurors.[31] The Court described the nature of the peremptory challenge as one utilizing a person's free will without the control of the court.[32] The Court concluded that even though the Constitution did not require that every jury consist of black persons proportionately equal to the number of blacks in the community, the Constitution required the entire jury selection process, including the peremptory challenge system, to be free of racial discrimination.[33] Courts have held that the exclusion of a juror solely because of the color of his skin was unconstitutional.[34] How-

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challenges to exclude black persons from the jury. *Id.* The circuit court jury convicted the defendant of rape. *Id.* The Supreme Court of Alabama later affirmed the conviction. *Id.*

[29] *Id.* at 221. The Court concluded that since the prosecutor took things such as race and national origin into account during voir dire, he had the right to base the use of his peremptory challenge upon such considerations. *Id.* To rule otherwise converted peremptory challenges into challenges for cause. *Id.* at 221-22. *See generally* Timothy Patton, *The Discriminatory Use of Peremptory Challenges in Civil Litigation: Practice, Procedure, and Review*, 19 TEX. TECH L. REV. 921, 921-23 (1988) (analyzing relationship between Equal Protection Clause and prosecutor's discriminatory use of peremptory challenges).

[30] *Swain*, 380 U.S. at 222. The Court stated that to demand an explanation from the prosecutor was "wholly at odds" with the entire peremptory challenge system. *Id.*

[31] *Id.* The Court noted that the Constitution protected all racial groups in the community from intentional discrimination. *Id.* at 204-05; *see* Hernandez v. Texas, 347 U.S. 475, 477-78 (1954) (stating Equal Protection Clause applied to all identifiable racial groups, not just blacks).

[32] *Swain*, 380 U.S. at 220. Unlike challenges for cause, which permitted exclusion on very narrow grounds, the essence of a peremptory challenge was that it permitted the exclusion of jurors even without an articulable reason. *Id.*

[33] *Id.* at 208. While the Constitution did not require that a jury be a mirror image of the community, it prohibited the exclusion of persons from the jury on the basis of race alone. *Id.*; *see* Thomas v. Texas, 212 U.S. 278, 282 (1909) (stating Constitution did not demand that juries have mixture of races, it required only fair jury selection process that was free of discrimination).

[34] Smith v. Texas, 311 U.S. 128, 130 (1940). The Supreme Court held that to allow racial discrimination in the jury selection process was completely contradictory with the mandates of the Constitution. *Id.* The Court also noted that this

ever, some courts have ruled the juror's beliefs, stemming from his race, constituted valid grounds for a challenge for cause.[35] Also, the Court reasoned that as a result of the prosecutor's authority to use peremptory challenges to exclude both blacks and whites, the exclusion of a black person did not necessarily establish racial discrimination.[36] Because the system of peremptory challenges allowed the exclusion of a juror for any reason, the system itself provided the justification for striking any person otherwise qualified to serve as a juror.[37] In every case there was a presumption that the prosecutor exercised his peremptory challenges to select a fair and impartial jury.[38] The fact that the prosecutor used his peremptory challenges to remove all the prospective black jurors did not automatically overcome this presumption of good faith.[39]

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type of racial discrimination stood in contrast to the values of a democratic society. *Id.*; *see* Hill v. Texas, 316 U.S. 400, 404 (1942) (stating that Equal Protection Clause prohibited jury selection procedures based on race).

[35] Potter v. State, 216 S.W. 886, 888 (Tex. Crim. App. 1919). The Court of Criminal Appeals of Texas held that if a prospective juror admitted that he was racially prejudiced, then a challenge for cause was the proper method to exclude that person. *Id.*; *see* State v. Sanders, 88 S.E. 10, 12 (S.C. 1916) (challenging for cause was correct way to dismiss racially prejudiced jurors). *But cf.* State v. Giudice, 153 N.W. 336, 339 (Iowa 1915) (stating that prejudice against defendant's race was not sufficient reason to support challenge for cause); Johnson v. State, 130 N.W. 282, 283 (Neb. 1911) (holding that juror's belief that whites were superior to blacks did not sustain challenge for cause). *See generally* L.S. Rogers, Annotation, *Racial, Religious, Economic, Social, or Political Prejudice of Proposed Juror as Proper Subject of Inquiry or Ground of Challenge on Voir Dire in Criminal Case*, 54 A.L.R.2D 1204, 1205-15 (1956) (analyzing various reasons for excluding and not excluding prospective jurors).

[36] *Swain*, 380 U.S. at 221. The Court noted that the peremptory challenge system exposed all races, classes, and religions to the possibility of exclusion. *Id.* Excluding a member of one of these categories did not necessarily give rise to a constitutional violation. *Id.* at 222.

[37] *Id.* at 212. The Supreme Court held that the essential nature of a peremptory challenge was that it could exclude anyone, for any reason. *Id.* The Court noted that the possible reasons for excluding a juror ranged from race, religion, and occupation to the color of the juror's eyes. *Id.*

[38] *Id.* at 222. The Court felt that this good faith presumption protected a prosecutor's judgment from scrutiny each time he exercised a peremptory challenge. *Id.* The Court also indicated that without this presumption, many present uses of peremptory challenges faced possible extinction. *Id.*

[39] *Id.* at 205. The Court stated that a defendant must prove that the prosecutor exercised a peremptory challenge to exclude a person solely on the basis of race. *Id.* A mere presumption or an assertion of discrimination was not sufficient.

However, the *Swain* Court concluded that if the defendant demonstrated that the prosecutor purposely discriminated against black persons over a series of prior cases,[40] then the defendant had proven a prima facie case of an equal protection violation.[41]

Many commentators severely criticized the *Swain* decision because of the high burden of proof that it imposed on a defendant who claimed a violation of his constitutional rights.[42] As a number of subsequent cases indicated, almost every attempt to meet the *Swain* standard failed.[43] Some states circumvent-

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Id.

[40] *Id.* at 224. The Court indicated that if a prosecutor, in all cases and under every set of circumstances, systematically excluded black persons from juries, then such action raised an inference of racial discrimination. *Id.* at 223. Also, the Court noted that a "token" inclusion of black jurors did not overcome a challenge that the State systematically excluded black persons from juries. *Id.* at 206. In *Swain*, however, the Court concluded that the defendant did not prove this systematic exclusion. *Id.* at 224-26.

[41] *Swain*, 380 U.S. at 224. The Court concluded that a defendant established a prima facie case of racial discrimination by producing evidence that the State allowed no black persons to sit as jurors in any criminal trial. *Id.* at 226. However, the Court cautioned that this evidence lacked sufficiency in proving racial discrimination by the State, absent a strong showing of the prosecutor's participation in excluding blacks from the jury panel. *Id.* at 227. The reason for this was that the defense counsel also possessed the authority to exclude blacks by using peremptory challenges. *Id.*

[42] Marc L. Greenburg, Comment, *The Prosecutor's Exercise of the Peremptory Challenge to Exclude Nonwhite Jurors: A Valued Common Law Privilege in Conflict with the Equal Protection Clause*, 46 U. CIN. L. REV. 554, 560 (1977). *Swain* established a formidable hurdle for victims of discrimination to cross for three reasons. *Id.* First, *Swain* declared that the mere exclusion of black persons from juries over a period of time did not necessarily constitute a systematic exclusion. *Id.* Secondly, the Court stated there was a presumption that the prosecutor used his peremptory challenges in a fair manner. *Id.* Finally, the Court never defined the elements of a pattern of systematic exclusion. *Id.*; *see also* Bruce J. Winick, *Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis*, 81 MICH. L. REV. 1, 10-11 (1982) (commenting that *Swain* erected seemingly insurmountable burden of proof for defendant to meet); Comment, Swain v. Alabama*: A Constitutional Blueprint for the Perpetuation of the All-White Jury*, 52 VA. L. REV. 1157, 1163 (1966) (criticizing *Swain*'s unjustifiable and virtually insuperable burden of proof).

[43] McCray v. Abrams, 750 F.2d 1113, 1120 (2d Cir. 1984), *cert. granted* and *judgment vacated*, 478 U.S. 1001, 1001 (1986). The Court of Appeals for the Second Circuit noted, without surprise, that in two decades almost no defendant met the *Swain* burden of proof. *Id.*; *see* United States v. Pearson, 448 F.2d 1207, 1217

ed this rule by allowing a black defendant to seek relief under the state's constitution.[44] As a result of *Swain*'s crippling burden of proof, the Supreme Court re-examined this issue[45] in *Batson v. Kentucky*.[46] In *Batson*, a black defendant claimed the prosecutor's use of peremptory challenges to strike black persons from the jury violated the Equal Protection Clause.[47] The Court held the Equal Protection Clause prohibited a prosecutor from using peremptory challenges to exclude jurors solely on the basis of race.[48] In addition, the Court concluded a discriminatory jury selection process harmed not

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(5th Cir. 1971) (describing *Swain*'s burden of proof as one most difficult for defendants to meet).

[44] People v. Wheeler, 583 P.2d 748, 761-62 (Cal. 1978). The California Supreme Court expressed the need to define a reasonably attainable burden of proof in cases involving a prosecutor's discriminatory use of peremptory challenges. *Id.* at 763. To achieve this goal, the court concluded that the use of peremptory challenges to exclude jurors solely on the basis of race violated the state's constitutional provision of the right to a jury pool representing a fair cross-section of the community. *Id.* at 761-62. The court rejected *Swain*'s systematic discrimination requirement and held that a defendant proved discrimination from the facts of his case alone. *Id.* at 767; *see* State v. Neil, 457 So. 2d 481, 486 (Fla. 1984) (holding that adhering to *Swain* test violated Florida's constitutional guarantee to impartial jury).

[45] Note, *Due Process Limits on Prosecutorial Peremptory Challenges*, 102 HARV. L. REV. 1013, 1019 (1989). While the United States Supreme Court never adopted the *Wheeler* approach in its entirety, some of *Wheeler*'s principles appeared in later Supreme Court opinions. *Id.* In subsequent cases, the Supreme Court rejected *Wheeler*'s reliance on the Sixth Amendment to prohibit prosecutorial discrimination and instead relied on the Equal Protection Clause. *Id.* at 1017. However, later Supreme Court cases adopted *Wheeler*'s contention that a showing of systematic discrimination was not necessary. *Id.* at 1019. *See generally* Alan R. Nye, Comment, People v. Wheeler*: Peremptory Challenges — A New Interpretation*, 14 NEW ENG. L. REV. 370, 383-88 (1978) (describing advantages and disadvantages of *Wheeler*'s rationale).

[46] 476 U.S. 79 (1986).

[47] *Batson*, 476 U.S. at 82-83. The defendant, a black man, objected to the prosecutor's use of peremptory challenges to strike all four black members of the venire. *Id.* The trial judge overruled the defendant's objection and the jury convicted the defendant. *Id.* at 83. The Supreme Court of Kentucky later upheld the defendant's conviction. *Id.*

[48] *Id.* at 86. The Supreme Court justified its holding by stating that the very essence of a jury was a body composed of persons of various races, ages, and occupations, each having equal rights under the law. *Id.* The Court noted that this essence no longer existed if race was the sole factor in selecting jurors. *Id.*; *see* Thiel v. Southern Pac. Co., 328 U.S. 217, 227 (1946) (holding that person's race was in no way valid indicator of his fitness to serve as juror).

only the defendant, but the excluded juror as well.[49] This type of exclusion also resulted in an undermining of public confidence in the American judicial system.[50] The Court overruled the portion of the *Swain* decision establishing the burden of proof required for a defendant to prevail on an equal protection claim.[51] After *Batson*, a black defendant established a prima facie case of a discriminatory use of peremptory challenges from the facts in his own case.[52] The *Batson* decision articulated three criteria needed to establish this prima facie case of racial discrimination.[53] First, the defendant proved that he was a member of a cognizable racial group.[54] Next, the defendant demonstrated that the prosecutor exercised his peremptory challenges to exclude prospective jurors of the defendant's race.[55] Finally, the defendant proved that these factors, along with any other relevant circumstances,

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[49] *Batson*, 476 U.S. at 87. The Court explained that excluding someone from jury service simply because of his race branded him as unfit to fulfill this important societal duty. *Id.*

[50] *Id.* The Court feared that if the practice of excluding jurors solely on the basis of race continued, the public would lose faith in the fairness of the American system of justice. *Id.*

[51] *Id.* at 92. The Court stated that the amount of proof required by *Swain* was simply too great. *Id.* The Court also recognized that because of *Swain*'s high burden of proof, prosecutors were almost totally immune to constitutional challenges. *Id.* at 92-93.

[52] *Id.* at 95. The Court followed the reasoning of equal protection cases in other areas, which held that proving a pattern of discrimination was not a requirement to prevail in an equal protection claim. *Id.*; *see* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266 n.14 (1977) (stating that consistent pattern of racial discrimination was not prerequisite to finding violation of Equal Protection Clause).

[53] *Batson*, 476 U.S. at 96. The Supreme Court noted that in equal protection cases, the burden of proving a prima facie case always fell upon the person alleging the racial discrimination. *Id.* at 93; *see also* Whitus v. Georgia, 385 U.S. 545, 550 (1967) (holding that burden of proof was always on person claiming violation of his rights and not on alleged discriminator).

[54] *Batson*, 476 U.S. at 94. To prove he was a member of a cognizable racial group, the Supreme Court required the defendant to show that members of his race were susceptible to differential treatment by society. *Id.*; *see, e.g.*, Castaneda v. Partida, 430 U.S. 482, 494 (1977) (showing that defendant was of Mexican-American descent was proof that he was member of racially cognizable group).

[55] *Batson*, 476 U.S. at 95. The Court reasoned that the prosecutor's use of a peremptory challenge to exclude even one black person constituted possible racial discrimination. *Id.*

raised an inference that the prosecutor did in fact base his use of peremptory challenges solely upon the juror's race.[56] After the defendant established this prima facie case, the prosecutor then had the burden of providing a race-neutral explanation for his actions.[57] The Court cautioned that the prosecutor did not rebut this prima facie case simply by maintaining that he honestly used his peremptory challenge without a discriminatory purpose.[58] The Supreme Court rejected the State's contention that restricting the prosecutor's ability to freely exercise his peremptory challenges stripped the peremptory challenge of its value[59] to the American system of justice.[60] Justice Marshall departed from the majority's ruling in *Batson* and contended that this case did precious little to assist a defendant in claiming an equal protection violation.[61] Commentators criticized the *Batson* decision because it left many

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[56] *Id.* at 96. The Court directed trial judges considering an equal protection question to take into account the facts of the defendant's case, along with any other factors that the trial judge deemed relevant to a proper determination of the matter. *Id.*; *see* Alexander v. Louisiana, 405 U.S. 625, 630 (1972) (suggesting that trial court consider all possible explanatory factors in deciding racial discrimination issues).

[57] *Batson*, 476 U.S. at 97. The Court conceded that the requirement of a race-neutral explanation somewhat limited the historical nature of the peremptory challenge. *Id.*

[58] *Id.* The Court explained that even though a prosecutor's assertion of his good faith use of the peremptory challenge failed to rebut a prima facie case, his explanation need not rise to the level required to justify a challenge for cause. *Id.*; *cf.* Jones v. Georgia, 389 U.S. 24, 25 (1967) (showing that Supreme Court earlier required State to give race-neutral explanation for exclusion of blacks from venire from which parties selected jury).

[59] *Batson*, 476 U.S. at 98. The State argued that a prosecutor's right to unfettered use of his peremptory challenges was of vital importance to the judicial system. *Id.* The State contended that the majority's decision made peremptory challenges almost worthless. *Id.*

[60] *Id.* The Supreme Court opined that the restriction upon the use of peremptory challenges had no ill effects on the judicial system. *Id.* In fact, the Supreme Court indicated that this restriction actually enhanced the value of the peremptory challenge. *Id.* at 99. The Court suggested that eliminating racism from jury selection strengthened the public's confidence in the jury system as a whole. *Id.*

[61] *Id.* at 102-03 (Marshall, J., concurring). Justice Marshall felt that, even after *Batson*, a defendant did not establish a prima facie case of racial discrimination unless the prosecutor's misuse of a peremptory challenge was exceedingly flagrant. *Id.* (Marshall, J., concurring).

questions unanswered.[62]

The Supreme Court resolved one of *Batson*'s unanswered questions, whether the defendant and the excluded juror had to be of the same race, in 1991, in the case of *Powers v. Ohio*.[63] *Powers* involved a white criminal defendant who objected to the prosecutor's use of his peremptory challenges to strike black persons from the jury.[64] The defendant sought relief from the Court by claiming the prosecutor violated the defendant's constitutional rights.[65] The Court accepted this argument and held that a criminal defendant asserted a meritorious equal protection claim even though he and the juror were of different races.[66] The Court concluded that to prevent a defendant from raising this type of equal protection claim

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[62] Albert W. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges, and the Review of Jury Verdicts*, 56 U. CHI. L. REV. 153, 169 (1989). Professor Alschuler suggested that the *Batson* decision left seven questions unanswered. *Id.* These questions were:

1) What was prima facie proof of discrimination?
2) What qualified as a racially neutral explanation?
3) What was the appropriate remedy for a violation?
4) Did any black representation on the jury nullify a claim of discrimination?
5) Did *Batson* extend to non-racial groups such as women?
6) Did *Batson* extend to racial groups other than the defendant's?
7) Was the discriminatory use of peremptory challenges permitted when used by defense attorneys?

Id. at 169-99.

[63] 111 S. Ct. 1364 (1991).

[64] *Powers*, 111 S. Ct. at 1366. The defendant objected when the prosecutor used peremptory challenges to exclude six black persons from the jury. *Id.* The trial judge overruled the defendant's objection. *Id.* The impanelled jury convicted the defendant of murder. *Id.* The Ohio Court of Appeals affirmed the conviction and the Ohio Supreme Court dismissed the defendant's claim because the court said his claim presented no constitutional question. *Id.* at 1366-67.

[65] *Id.* at 1367. The defendant claimed the prosecutor's discriminatory use of peremptory challenges violated both the Sixth Amendment right to a fair cross-section on the venire and the Equal Protection Clause of the Fourteenth Amendment. *Id.* The Supreme Court dismissed the defendant's Sixth Amendment claim. *Id.*; *see* Holland v. Illinois, 493 U.S. 474, 487 (1990) (holding Sixth Amendment did not restrict exclusion of racial groups by use of peremptory challenges).

[66] *Powers*, 111 S. Ct. at 1370. The Court reaffirmed the Equal Protection Clause prohibited a prosecutor from using his peremptory challenges to exclude otherwise qualified jurors solely on the basis of race. *Id.* The fact that there was a difference between the defendant's race and the excluded juror's race did not alter this principle of equal protection. *Id.*

meant that the government condoned the arbitrary exclusion of its citizens from the honor of jury service.[67] The Supreme Court recognized that this ruling did not overrule the *Batson* decision, but merely broadened its area of application.[68] In addition, the Court also held that the criminal defendant had third-party standing to bring an equal protection claim on behalf of the excluded juror.[69] The defendant had the right to bring this third-party equal protection claim because he met the following three criteria.[70] The first requirement was that the prosecutor's exercise of peremptory challenges to remove jurors because of race alone caused the defendant actual injury.[71] Next, the defendant demonstrated he had a close relationship with the excluded juror because they both had a common interest in eliminating racism from the judicial system.[72] Finally, the defendant proved there were hindering

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[67] *Id.* at 1373. The Court noted that the Constitution prohibited governmental condonance of racism. *Id.* The Fourteenth Amendment's mandate against racial discrimination was the most compelling in the judicial system. *Id.* The Court concluded that all courts had an affirmative duty to enforce the constitutional prohibitions against racism. *Id.*; *see* Wayte v. United States, 470 U.S. 598, 608 (1985) (holding that courts could not allow race as basis for prosecutorial discretion).

[68] *Powers*, 111 S. Ct. at 1373-74. The Court explained that the decision in *Powers* did not run afoul to any of the basic principles of *Batson*. *Id.* at 1374. The Court held that by removing the requirement of racial identity between the defendant and the excluded juror, the *Powers* decision expanded the number of cases to which the *Batson* principles applied. *Id.* at 1373-74.

[69] *Id.* at 1373. The Supreme Court stated that in a claim involving a prosecutor's discriminatory use of peremptory challenges, a criminal defendant possessed the authority to bring an equal protection claim on the behalf of the excluded juror. *Id. But see* United States Dep't of Labor v. Triplett, 494 U.S. 715, 720 (1990) (stating that in most cases litigant asserted only his own rights and not those of third parties).

[70] *Powers*, 111 S. Ct. at 1370. The Court explained that unless the defendant met each of these three criteria for third party standing, the defendant had no right to bring a suit on behalf of an excluded juror. *Id.*

[71] *Id.* at 1371. The Supreme Court reasoned that a prosecutor's discriminatory use of peremptory challenges caused the defendant harm, in that it deprived the defendant of a trial by a fairly chosen jury. *Id.* The Court then noted the long-standing principle that the Constitution entitled every defendant to a trial free of racial discrimination. *Id.*; *see* Allen v. Hardy, 478 U.S. 255, 259 (1986) (recognizing that criminal defendants had constitutional interest in jury selection process void of racial discrimination).

[72] *Powers*, 111 S. Ct. at 1372. The Court concluded that in equal protection

factors that made it unlikely that the excluded juror would bring this equal protection action on his own behalf.[73] Therefore, after *Powers*, the lack of racial identity between the defendant and the excluded juror no longer precluded an equal protection claim.[74]

In other areas, the Supreme Court has held that a person raised a valid equal protection claim only when the discriminatory act constituted state action.[75] If an individual acted as a private party in discriminating against black persons, then he did not violate the Equal Protection Clause of the Fourteenth Amendment.[76] This was true even if the discrimination was willful and purposeful.[77] In *Swain*, *Batson*, and

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cases, which involved a discriminatory use of peremptory challenges, both the defendant and the excluded juror had a common interest in eliminating racism. *Id.* The Court recognized the excluded juror's interest was to not suffer public humiliation as a result of the prosecutor's discriminatory actions. *Id.* The Court also noted that the defendant's interest in a fair and impartial jury demanded the elimination of racial discrimination from the judicial system. *Id.*

[73] *Id.* The Supreme Court stated that there were numerous barriers which prevented an excluded juror from bringing a suit on his own behalf. *Id.* These barriers included the juror's lack of an opportunity to be heard at the time of the exclusion, the difficulty in obtaining injunctive or declaratory relief, and the high cost of litigation. *Id.* at 1373.

[74] *Id.* at 1373. The Court noted that while racial identity between the defendant and the excluded juror made racial discrimination easier to prove, it was no longer a requirement in order to bring an equal protection claim. *Id.* at 1373-74. *See generally* Robert L. Harris, Jr., Note, *Redefining the Harm of Peremptory Challenges*, 32 WM. & MARY L. REV. 1027, 1043-44 (1991) (analyzing Supreme Court's reasoning in *Powers* and suggesting possible consequences had Court ruled differently).

[75] Civil Rights Cases, 109 U.S. 3, 10-11 (1883). The Supreme Court ruled the prohibitions expressed in the Fourteenth Amendment applied only to actions attributable to the State. *Id.*

[76] *Id.* at 11. The Supreme Court held that the Fourteenth Amendment did not give the government the authority to regulate the discriminatory acts of private individuals. *Id.* The Court felt that this holding was in harmony with the purpose of the Fourteenth Amendment which was to control the actions of the State, not private citizens. *Id.*; *see* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 172 (1972) (stating that Equal Protection Clause of Fourteenth Amendment erected no barrier against private discrimination).

[77] R. George Wright, *Litigating the State Action Issue in Peremptory Challenge Cases*, 13 AM. J. TRIAL ADVOC. 573, 574-75 (1989). Actions by a private party did not violate the Equal Protection Clause, no matter how harmful or intentional the discrimination. *Id.* The Constitution only prohibited the discriminatory acts of the State. *Id.* at 575.

Powers, the Supreme Court never felt obligated to discuss the state action issue[78] because the actions of the prosecutors[79] were clearly actions attributable to the State.[80] As a result of the numerous types of situations from which state action issues arose, the law concerning what constituted and what did not constitute state action was a very difficult area for the Supreme Court to develop.[81] The Court attempted to make the issue of state action more certain in *Lugar v. Edmonson Oil Co.*[82] In *Lugar*, a debtor claimed a violation of his Fourteenth Amendment rights by a creditor, who, pursuant to a state law and with the assistance of government officials, obtained a pre-judgment attachment on the debtor's property.[83] The Supreme Court held that the conduct of the creditor was state action[84] and that the creditor infringed upon the debtor's Fourteenth Amendment due process rights.[85] The

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[78] *Batson*, 476 U.S. at 89 n.12. The *Batson* Court declined to express an opinion on the constitutional limitations on the use of peremptory challenges by persons other than a prosecutor. *Id.*

[79] Wright, *supra* note 77, at 575. State action was unquestionably present when the prosecutor, a government employee, exercised peremptory challenges to remove persons from the jury. *Id.*

[80] *Id.* Action of a private attorney violated no constitutional mandate unless his action was state action. *Id.* However, the actions of a private attorney that represented the government in a civil case were state action. *Id. But cf.* Polk County v. Dodson, 454 U.S. 312, 318-19 (1981) (holding that Polk County public defender was not state actor because public defender best served public by advancing interest of his clients and not State).

[81] Wright, *supra* note 77, at 576. Supreme Court cases offered little decisive guidance to litigants with a state action issue. *Id.* This lack of clarity reflected the confusing status of the case law regarding state action. *Id.*

[82] 457 U.S. 922 (1982).

[83] *Lugar*, 457 U.S. at 924. The debtor claimed that the creditor violated his equal protection rights by obtaining a pre-judgment attachment on the debtor's property. *Id.* The creditor obtained the attachment pursuant to a Virginia statute and with the assistance of state officials. *Id.* The debtor argued that the creditor's actions in obtaining the attachment were state action and therefore were subject to the limitations of the Fourteenth Amendment. *Id.* at 925. The trial court held that the creditor's actions were not state action. *Id.* The Court of Appeals for the Fourth Circuit affirmed. *Id.*

[84] *Id.* at 942. The Court determined that because the creditor obtained the attachment pursuant to a state statute and government officials assisted the creditor in executing the attachment, these actions were state actions. *Id.*

[85] *Id.* The Supreme Court reasoned that because state action deprived the debtor of his property without due process of law, the debtor presented a valid

Lugar Court began its analysis by reviewing the various tests that the Court used to find state action in earlier cases which included the "public function" test,[86] the "state compulsion" test,[87] and the "symbiotic relationship" (nexus) test.[88] The Supreme Court conceded that all of these previously used tests were possibly just different variations of a single "state action" test.[89] The Court in *Lugar* attempted to combine these earlier state action tests into a simple two-part analysis.[90] The first step in the *Lugar* test was to determine whether the claimed constitutional deprivation was the result of actions that originated in state authority.[91] The second step in the *Lugar* analysis was to determine whether, under the circumstances of the case, the party charged with the deprivation was, in all fairness, a state actor.[92] The Supreme Court concluded its analysis in *Lugar* by reaffirming its posi-

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Fourteenth Amendment claim. *Id.*

[86] Marsh v. Alabama, 326 U.S. 501, 506 (1946). The Supreme Court ruled that if a private party performed what was essentially a "public function," then such conduct constituted state action. *Id.* In *Marsh*, the public function was a private company's operation of a town. *Id.*

[87] Adickes v. S.H. Kress & Co., 398 U.S. 144, 170 (1970). The Court held actions of a private party were state action when the State compelled the private party to act in that manner. *Id.* The state action in *Adickes* was a state-enforced practice of requiring segregated restaurants. *Id.* at 147.

[88] Burton v. Wilmington Parking Auth., 365 U.S. 715, 726 (1961). The Court held that when a private party acted jointly with the State to discriminate, such conduct violated the Equal Protection Clause. *Id.* The joint participation in *Burton* occurred when a government-owned parking garage leased space to a cafe that discriminated against blacks. *Id.* at 716-17.

[89] *Lugar*, 457 U.S. at 939. The Supreme Court indicated that these tests were possibly just different ways of characterizing the inquiry into state action. *Id.* The Court reasoned that similarities existed between these tests because each test required a court to sift the facts and weigh all of the circumstances of each situation. *Id.* (citing *Burton*, 365 U.S. at 722).

[90] *Id.* The Supreme Court did not add any new elements to the state action analysis, the Court merely took various elements of its prior tests and combined these to form this two-part analysis. *Id.*

[91] *Id.* In considering the first factor, the Supreme Court considered whether the actions that caused the deprivation resulted from the exercise of a right or privilege created by the State, the imposition of a rule of conduct by the State, or the action of a person having authority granted by the State. *Id.* at 937.

[92] *Id.* To determine the second prong of the test, the Court looked to whether the actor worked together with government officials or whether the private party's conduct constituted action otherwise attributable to the State. *Id.*

tion that the Constitution offered no protection against discrimination by a private party.[93]

In the instant case, a majority of the United States Supreme Court concluded that because the peremptory challenge exclusion resulted in conduct attributable to the government,[94] the use of a peremptory challenge was state action.[95] As a result, the restrictions that confined the government's use of peremptory challenges[96] should also have confined the actions of a private litigant.[97] Finally, the

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[93] *Id.* The Court held that the continued compliance to the state action requirement safeguarded individual freedom by restricting governmental control of private actions. *Id.* The state action requirement also protected the government from liability for the discriminatory acts of persons not under the State's control. *Id.*

[94] Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2083 (1991). The Court concluded that, without a doubt, Leesville Concrete exercised its peremptory challenges by virtue of a right or privilege having its source in state authority. *Id.* In the instant case, the Court noted that a federal statute provided for the exercise of peremptory challenges and that without an act of Congress, Leesville Concrete could not have utilized these challenges. *Id.* The Supreme Court applied the facts in the instant case to three separate tests to determine if Leesville Concrete was in all fairness a state actor. *Id.* The three tests were: "(1) the extent to which the actor relied on governmental assistance and benefits, . . . (2) whether the actor performed a traditional governmental function, and . . . (3) whether the incidents of governmental authority aggravated the defendant's injury." *Id.* To satisfy the first test, the Supreme Court noted that a private litigant could not exercise a peremptory challenge without the "overt, significant assistance" of the State. *Id.* at 2084 (quoting Tulsa Professional Collection Serv., Inc. v. Pope, 485 U.S. 478, 486 (1988)). This assistance arose from both the government's actions in bringing together the prospective jurors and the trial judge's role in discharging a prospective juror. *Id.* The Court satisfied the second test by concluding that the selection of a jury was a traditional governmental function. *Id.* at 2085. The Supreme Court also reasoned that the government allowed the aggravation of the discrimination because it happened inside the courthouse. *Id.* at 2087.

[95] *Id.* at 2082. The Supreme Court noted that racial discrimination violated the Constitution only when that conduct was "state action." *Id.* The Supreme Court also noted that a deprivation of any of the equal protection rights of the Constitution applied only when that deprivation was a result of governmental actions. *Id.*

[96] *Id.* The Supreme Court stated that the Constitution confined the actions of the State and that one of these restrictions was that a state actor may not strike a prospective juror solely on the basis of race. *Id.*

[97] *Id.* The Court concluded that because Leesville Concrete was a state actor it could use its peremptory challenges only within the confines of constitutional mandates. *Id.*

Court concluded that since these constitutional restrictions also applied to private litigants, then a private litigant could not use a peremptory challenge to exclude a prospective juror solely on the basis of race.[98]

In a dissenting opinion,[99] Justice O'Connor concluded that since a private litigant's use of a peremptory challenge was not accompanied by overt, significant participation of the government[100] and was not a traditional government function,[101] then the actions of Leesville Concrete were not attributable to the State.[102] Justice O'Connor reasoned that since Leesville Concrete was not a state actor, it could have exercised its peremptory challenges in any manner that it saw fit.[103]

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[98] *Id.* The Court noted that had Leesville Concrete not been a state actor, it could have used its peremptory challenges in any manner, with no constitutional violations. *Id.*

[99] *Edmonson*, 111 S. Ct. at 2089 (O'Connor, J., dissenting). Chief Justice Rehnquist and Justice Scalia joined with Justice O'Connor in dissenting. *Id.* (O'Connor, J., dissenting).

[100] *Id.* (O'Connor, J., dissenting). Justice O'Connor reasoned that the only government participation in the jury selection process was that after a party excluded a prospective juror by the use of a peremptory challenge, the judge excused that person from the venire. *Id.* (O'Connor, J., dissenting). While this may have been government participation, Justice O'Connor felt that it fell far short of the overt, significant participation needed to rise to the level of state action. *Id.* (O'Connor, J., dissenting).

[101] *Id.* at 2092 (O'Connor, J., dissenting). Justice O'Connor criticized the Court for concluding that the exercise of a peremptory challenge was a traditional government function. *Id.* (O'Connor, J., dissenting). In addition, Justice O'Connor noted that the use of peremptory challenges was a tradition of private personal choice, not a traditional government function. *Id.* (O'Connor, J., dissenting). The O'Connor dissent concluded that the essential nature of a peremptory challenge was that it utilized a litigant's free will and was not under the control of the court. *Id.* (O'Connor, J., dissenting).

[102] *Id.* at 2089 (O'Connor, J., dissenting). Justice O'Connor noted that not every activity that took place within the confines of the courtroom was state action. *Id.* (O'Connor, J., dissenting). Accordingly, Justice O'Connor stressed that the government only provided the forum for the resolution of private conflicts. *Id.* (O'Connor, J., dissenting). Justice O'Connor stated, "[t]he government erects the platform; it does not thereby become responsible for all that occurs upon it." *Id.* (O'Connor, J., dissenting).

[103] *Id.* (O'Connor, J., dissenting). While society would like to totally eliminate all traces of racial discrimination, Justice O'Connor expressed the view that "the Constitution does not sweep that broadly." *Id.* (O'Connor, J., dissenting). Finally,

Although there are never any easy solutions when dealing with the problem of racial discrimination, the Supreme Court, in *Edmonson*, took a positive step towards the elimination of racial discrimination in the federal courts.[104] The Supreme Court's finding of the requisite state action was, at best, tenuous.[105] However, this was not the first time that the Supreme Court went out on a limb in order to find state action.[106] While the Court may have based its reasoning in this case on shaky grounds, the end result of *Edmonson* will be to effect positive changes in the federal courts.[107] By prohibiting a private party from using peremptory challenges to exclude jurors solely on the basis of race, *Edmonson* will now bring a civil litigant's rights up to par with those rights criminal defendants enjoy.[108] As a result, both the plaintiff and the defendant in a federal civil case will now enter the trial with a greater sense of assurance that racial discrimination will not be a factor in the jury selection process.[109] Consequently, a civil litigant will be more confident of having a fair and impartial jury decide his case.[110] However, the *Edmonson* decision will also create an uncertain future for other areas of the law such as the continued existence of the peremptory challenge system.[111] By continuing to place limitations on the use of peremptory challenges, the Supreme Court appears to be heading down a path which is likely to

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Justice O'Connor concluded that the use of peremptory challenges was fundamentally a private choice. *Id.* (O'Connor, J., dissenting). Justice Scalia agreed entirely with Justice O'Connor's dissent, but added there were other unfortunate results of the majority's opinion. *Id.* at 2095 (Scalia, J., dissenting). The Scalia dissent feared that the majority's ruling would further complicate the already complex American system of justice. *Id.* (Scalia, J., dissenting). Scalia expressed concern that judges and lawyers would now spend an enormous amount of time implementing this new law and he predicted that Congress might totally abolish peremptory challenges. *Id.* at 2095-96 (Scalia, J., dissenting).

[104] *See supra* note 16 and accompanying text.

[105] *See supra* notes 94-95.

[106] *See supra* notes 86-88 and accompanying text.

[107] *See supra* note 60.

[108] *See supra* notes 96-97.

[109] *See supra* note 50 and accompanying text.

[110] *See supra* note 48.

[111] *See supra* notes 14-15 and accompanying text.

lead to the total elimination of peremptory challenges.[112] This would be an unfortunate result because, while peremptory challenges are subject to possible abuse, they are an instrumental device in the selection of fair and impartial juries.[113] Another issue that *Edmonson* leaves open is whether this prohibition against the discriminatory use of peremptory challenges will now apply to criminal defendants.[114] While in the past the Supreme Court has held that a criminal defense counsel was not a state actor,[115] *Edmonson* seems to say that anyone who exercises a peremptory challenge is a state actor.[116] Therefore, it appears likely that the Court will now find that the prohibition against the discriminatory use of peremptory challenges also applies to criminal defendants.[117] Even though *Edmonson* leaves these important issues unresolved, this decision represents another great victory in the Supreme Court's battle against racial discrimination in the American judicial system.[118]

Michael Dennis Rawls Stevens

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[112] *See supra* note 103.

[113] *See supra* note 15 and accompanying text.

[114] *See supra* note 21.

[115] *See supra* note 80.

[116] *See supra* notes 94-95.

[117] *See supra* notes 95-96. Subsequent to the writing of this casenote, the United States Supreme Court held that the Constitution prohibits a criminal defendant from exercising peremptory challenges in a racially discriminatory manner. Georgia v. McCollum, 112 S. Ct. 2348, 2359 (1992).

[118] *See supra* note 67.

CONSTITUTIONAL LAW--DOUBLE JEOPARDY--WHERE CONSPIRACY TO COMMIT A CRIME IS BASED ON PREVIOUSLY PROSECUTED OVERT ACTS, NO DOUBLE JEOPARDY VIOLATION EXISTS

Petitioner[1] prosecuted the respondent[2] in the United States District Court for the Eastern District of Oklahoma for conspiracy to manufacture methamphetamine, an illegal drug, and for substantive charges connected with operating the manufacturing facility in Oklahoma.[3] However, prior to this prosecution, a Missouri federal court convicted[4] the respondent for attempting to manufacture the drug in Missouri.[5] The respondent contended that the evidence of misconduct admitted in the Oklahoma prosecution duplicated the misconduct convicting him in the Missouri trial.[6] Nevertheless, the

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[1] Petitioner was the United States. United States v. Felix, 112 S. Ct. 1377, 1380 (1992).

[2] *Felix*, 112 S. Ct. at 1379. The respondent was Frank D. Felix. *Id.*

[3] *Id.* at 1379-80. The respondent violated applicable federal statutes by manufacturing methamphetamine. *Id.* at 1379. Drug Enforcement Administration agents raided and shut down the respondent's manufacturing facility in Oklahoma. *Id.* The petitioner later prosecuted him for manufacturing the illegal drug. *Id.* at 1380.

[4] *Id.* at 1379. The United States Court of Appeals for the Eighth Circuit affirmed the conviction and sentence. *Id.*

[5] *Id.* The respondent fled from Oklahoma to Missouri following the Drug Enforcement Administration shut down of his facility in Oklahoma. *Id.* In addition, the respondent purchased chemicals and equipment necessary for the manufacture of the drug from a Drug Enforcement Administration informant, and government officials arrested him after observing him inspect the items. *Id.* at 1380.

[6] *Id.* at 1381. With respect to the conspiracy charge, the prosecution introduced evidence at both trials that the respondent learned to make and manufacture the drug in Oklahoma. *Id.* In addition, after the shut down, the defendant bought chemicals and equipment to produce the drug in Missouri. *Id.* With respect to the substantive offenses, the petitioner introduced evidence to directly support the charges in Oklahoma that the respondent bought chemicals and equipment and later manufactured the drug in Oklahoma. *Id.* The Missouri prosecution introduced this evidence to show the respondent's intent. *Id.*

Oklahoma jury convicted the respondent on all counts.[7] The United States Court of Appeals for the Tenth Circuit reversed and remanded,[8] holding that the Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States[9] barred prosecution on these charges.[10] On writ of certiorari, the United States Supreme Court, *held*, reversed.[11] Where the jury convicted the defendant of substantive offenses based upon certain overt acts, a later prosecution for conspiracy supported by these acts did not create a double jeopardy violation. *United States v. Felix*, 112 S. Ct. 1377 (1992).

The concept of double jeopardy evolved from the common law pleas of England.[12] The English courts were the first to

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[7] *Felix*, 112 S. Ct. at 1381. The jury convicted the respondent of counts one through six which included the conspiracy charge and the substantive offenses. *Id.* at 1380-81. Furthermore, the jury convicted the respondent of counts nine and ten which charged him with unlawful interstate commerce. *Id.* at 1381 n.1.

[8] *Id.* at 1381. The United States Court of Appeals for the Tenth Circuit reversed the conviction of counts one through six of the Oklahoma indictment. *Id.* In addition, this court affirmed the convictions on counts nine and ten which charged the respondent with unlawful interstate travel. *Id.* at 1381 n.1. The appellate court concluded that the Double Jeopardy Clause of the Fifth Amendment did not bar these counts as they were not related to the Missouri trial. *Id.*

[9] *Id.* at 1379. The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides: "nor shall any person be subject for the same offence [sic] to be twice put in jeopardy of life or limb." U.S. CONST. amend. V.

[10] *Felix*, 112 S. Ct. at 1381. The United States Court of Appeals for the Tenth Circuit reversed the conspiracy conviction on double jeopardy grounds. *Id.* The court reasoned that the defendant's previous conviction of substantive offenses encompassed the overt acts supporting the conspiracy charge. *Id.* Similarly, the court reversed the substantive offenses conviction because the introduction of the same evidence at both trials violated the Double Jeopardy Clause. *Id.*

[11] *Id.* The United States Supreme Court held that the Double Jeopardy Clause of the Fifth Amendment did not bar prosecution of the respondent for the conspiracy charge or the substantive offenses. *Id.* The opinion of the Supreme Court was split. *Id.* at 1379. Chief Justice Rehnquist delivered the majority opinion and Justice Stevens wrote an opinion concurring in part and concurring in judgment, in which Justice Blackmun joined. *Id.* The majority reasoned that although the government presented the same evidence of conduct at both trials, the two prosecutions did not constitute multiple convictions for the same offense. *Id.* at 1382-85. Thus, the Double Jeopardy Clause was not applicable. *Id.*

[12] United States v. DiFrancesco, 449 U.S. 117, 128 (1980). The English common law's double jeopardy protection took the form of four pleas in bar: *autrefois acquit* (former acquittal), *autrefois convict* (former conviction), *autrefois attaint* (former attainder) and pardon. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE

attempt a definition of the same offense language included in the double jeopardy concept[13] in the case of *The King v. Vandercomb*.[14] In *Vandercomb*, the court indicted the defendants for burglary by breaking, entering and stealing goods, but the jury later acquitted them.[15] Subsequently, the court indicted the defendants for burglary by breaking and entering with intent to steal to which they pled *autrefois acquit*.[16] The court held that the acquittal was no bar to the second indictment, unless the proof of facts in the second indictment would convict the defendants in the first prosecution.[17]

Since establishment of the Double Jeopardy Clause in the United States,[18] American courts have struggled to interpret

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LAWS OF ENGLAND *335-38. The common law universal maxim stated that "no man is to be brought into jeopardy of his life, more than once, for the same offence [sic]." *Id.* at *335. This maxim grounded the plea of *autrefois acquit*. *Id.* *See generally* Charles L. Cantrell, *Double Jeopardy and Multiple Punishment: An Historical and Constitutional Analysis*, 24 S. TEX. L.J. 735, 747-69 (1983) (summarizing history of Double Jeopardy Clause).

[13] Scott J. Sheldon, *Criminal Law and Procedure: The Conflict Between Order and Liberty "Same Offense" or "Same Conduct"?: Double Jeopardy's New Course in* Grady v. Corbin, 1 SETON HALL CONST. L.J. 7, 19 n.82 (1990). Various American courts followed with variations of the same evidence test. *Id.*

[14] 168 Eng. Rep. 455 (1796).

[15] *Vandercomb*, 168 Eng. Rep. at 456-57. The jury acquitted the defendants upon discovering that they had not taken property from the house. *Id.* at 461.

[16] *Id.* at 457. The defendants pled that the prior acquittal barred all later prosecutions. *Id.* at 459. However, the court distinguished the two burglaries as separate felonies, and convicted the defendants of both. *Id.* at 461.

[17] *Id.* The *Vandercomb* Court cited Turner's Case, 84 Eng. Rep. 1068 (K.B. 1708), as authority. *Vandercomb*, 168 Eng. Rep. at 460. Similar to *Vandercomb*, in *Turner's Case* the court first tried and later acquitted the defendant of burglary. *Turner's Case*, 84 Eng. Rep. at 1068. Subsequently, the court indicted the defendant for the felony of stealing money based on the same acts. *Id.* The court held the felonies were separate and the indictment was proper. *Id.*

[18] U.S. CONST. amend. V. The Double Jeopardy Clause of the Fifth Amendment states: "nor shall any person be subject for the same offence [sic] to be twice put in jeopardy of life or limb." *Id.* This protection developed out of the early English common law pleas in bar. Crist v. Bretz, 437 U.S. 28, 41 (1978) (Powell, J., dissenting); *c.f.* United States v. Martin Linen Supply Co., 430 U.S. 564, 568-69 (1977) (quoting United States v. Wilson, 420 U.S. 332, 342 (1975), for proposition that common law origins suggested Double Jeopardy Clause protected multiple prosecutions, not governmental appeals). *See generally* United States v. Ball, 163 U.S. 662, 669 (1896) (stating American courts followed English authority and reasoning). Years later, the United States Supreme Court provided a definition of the Double Jeopardy Clause for the first time in *Ex Parte* Lange, 85

the language and meaning contained therein.[19] The early United States Supreme Court interpreted the language of the Double Jeopardy Clause literally, notably beginning with the case of *Gavieres v. United States*.[20] In *Gavieres*, the Court convicted the defendant under a city ordinance and subsequently under an article of the penal code.[21] The defendant contended that the latter prosecution violated the Double Jeopardy Clause because both offenses were supported by the same conduct, but the Court rejected this argument, finding the crimes charged were separate offenses.[22] In so holding, Justice Day essentially rejected the same transaction test, adopted the same evidence test,[23] and held that two indict-

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U.S.(18 Wall.) 163 (1873). Cantrell, *supra* note 12, at 736. "If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense." *Lange*, 85 U.S. at 168. The Fifth Amendment guarantee against double jeopardy protected against a second prosecution for the same offense after conviction or acquittal, and against multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711, 717 (1969).

[19] Honorable Monroe G. McKay, *Double Jeopardy: Are the Pieces the Puzzle?*, 23 WASHBURN L.J. 1, 1 (1983). Justice Rehnquist stated that although the language of the Double Jeopardy Clause was simple, the "decisional law in the area is a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator." Albernaz v. United States, 450 U.S. 333, 343 (1981); *see* Whalen v. United States, 445 U.S. 684, 699 (1980) (Rehnquist, J., dissenting) (naming Double Jeopardy Clause most frequently litigated Bill of Rights provision). Over the years, the Court has interpreted the meaning and language of the Double Jeopardy Clause with little consistency or clarity. Burks v. United States, 437 U.S. 1, 9 (1978); *see* Cantrell, *supra* note 12, at 738 (articulating highly speculative nature of double jeopardy area of constitutional law).

[20] 220 U.S. 338 (1911).

[21] *Gavieres*, 220 U.S. at 341. The defendant conducted himself in a reckless, indecent and discourteous manner in public. *Id.* at 342. This one episode violated both the city ordinance and the penal code. *Id.* at 341-42.

[22] *Id.* The Double Jeopardy Clause protected the defendant from second jeopardy for the same offense. *Id.* The Court concluded that each of the charges required proof of an element the other did not. *Id.* at 342-44.

[23] *Id.* at 342-43. The same transaction test required the prosecution to join in one trial all charges "against the defendant that grow out of a single criminal act, occurrence, episode or transaction." Ashe v. Swenson, 397 U.S. 436, 453-54 (1970) (Brennan, J., concurring). By contrast, the same evidence test prohibited successive prosecutions only if the same evidence supported both convictions. Carter v. McClaughry, 183 U.S. 365, 395 (1902) (quoting Morey v. Commonwealth, 108 Mass. 433, 434 (1871)). Furthermore, the Court acknowledged that the test was not whether the defendant stood trial twice for the same conduct, as the

ments did not violate the Double Jeopardy Clause when each required proof of an additional fact which the other did not.[24]

Adopting language from *Gavieres*, the Supreme Court established the most influential and long lasting authority for double jeopardy violations in the case of *Blockburger v. United States*.[25] In *Blockburger*, the jury convicted the defendant for selling a controlled substance in violation of two provisions of the Harrison Anti-Narcotic Act.[26] The defendant contended that the single sale of the drug violating two provisions of the Act constituted only one offense, deserving only one penalty.[27] However, the Court held that the imposition of punishment for each violation was correct.[28] In reaching this conclu-

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same transaction test indicated, but whether the defendant was twice put in jeopardy for the same offense. *Carter*, 183 U.S. at 395 (quoting *Morey*, 108 Mass. at 434). Rather than the same evidence test, Justice Brennan strongly supported the same transaction test in numerous dissents and concurrences in an effort to persuade the majority. Sara Barton, Comment, Grady v. Corbin: *An Unsuccessful Effort to Define "Same Offense"*, 25 GA. L. REV. 143, 152-53 (1990); *see, e.g.*, Jones v. Thomas, 491 U.S. 376, 387 (1989) (Brennan, J., dissenting); Morris v. Mathews, 475 U.S. 237, 257 (1986) (Brennan, J., dissenting). *But see* Garrett v. United States, 471 U.S. 773, 790 (1985) (explicitly rejecting same transaction test). Although not directly citing as such, *Gavieres* adhered to the same evidence test established in *Vandercomb*. Bryon L. Land, Note, *Increased Double Jeopardy Protection for the Criminal Defendant:* Grady v. Corbin, 27 WILLAMETTE L. REV. 913, 917 n.30 (1991); *accord Ashe*, 397 U.S. at 451 (Brennan, J., dissenting) (stating that at common law, this test provided little protection to multiple punishment).

[24] *Gavieres*, 220 U.S. at 342 (quoting *Morey*, 108 Mass. at 434). The evidence that established a violation of the ordinance did not sufficiently prove indictment under the penal code. *Gavieres*, 220 U.S. at 343. In *Morey*, the state court indicted the defendant first for lewd and lascivious cohabitation and second for adultery. *Morey*, 108 Mass. at 433. In upholding both indictments, the court held that full proof of either indictment did not establish conviction of the other. *Id.* at 436. Therefore, conviction of unlawful cohabitation did not bar indictment of adultery. *Id.*

[25] 284 U.S. 299 (1932).

[26] *Blockburger*, 284 U.S. at 301. The defendant sold to the same purchaser first ten grains of morphine hydrochloride and on the following day eight grains of the same drug. *Id.* The jury convicted the defendant on three counts: (1) selling ten grains of a controlled substance not in or from the original stamped package, (2) selling eight grains of a controlled substance not in or from the original stamped package, and (3) selling the latter without an order from the purchaser. *Id.*

[27] *Id.* The defendant's second contention was that since the two sales of the drug were made to the same purchaser on consecutive days, then the two sales constituted one single offense. *Id.*

[28] *Id.* at 304. With respect to the second contention, the Court held that the

sion, the Justices applied the test used in *Gavieres* and held that the offenses were separate and distinct.[29] Under the *Blockburger* test,[30] if the defendant's single act violated two statutory provisions, he committed two offenses if each provision required proof of an additional fact the other did not.[31]

Expanding the ruling in *Blockburger*, the Supreme Court held in *United States v. Bayer*[32] that the agreement to do an act was distinct from performance of the act itself.[33] In *Bayer*, the defendant, a military officer, accepted payments of

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defendant engaged in two separate criminal acts, not one continuing offense by selling to the same purchaser. *Id.* at 302-03. Therefore, the jury's conviction of both sales separately was correct. *Id.*

[29] *Id.* at 304. The Court determined that the Act's purpose was penalizing the sale of the drug outside of the two provisions, not forbidding the sale of illegal drugs. *Id.*

[30] *Id.* The Court applied the *Blockburger* test when the same transaction or act violated two statutory provisions. *Id.* The Court decided *Blockburger* in the context of multiple punishments for the same offense. Land, *supra* note 23, at 918. However, where congressional intent clearly authorized multiple punishments for the same conduct, the Double Jeopardy Clause did not preclude the punishments regardless of the outcome under *Blockburger*. Missouri v. Hunter, 459 U.S. 359, 368-69 (1983); *see* Albernaz v. United States, 450 U.S. 333, 340 (1981) (holding *Blockburger* rule of statutory construction not controlling when there is clear indication of contrary intent). *See generally* Cantrell, *supra* note 12, at 742-47 (summarizing role of congressional intent in *Blockburger*). In the absence of congressional intent, *Blockburger* controlled by assuming Congress did not usually intend to punish the same conduct twice. Whalen v. United States, 445 U.S. 684, 692 (1980).

[31] *Blockburger*, 284 U.S. at 304. In the area of multiple punishments for the same offense, the Supreme Court essentially adhered to and strictly applied the *Blockburger* test. Eli J. Richardson, Recent Development, *Matching Tests for Double Jeopardy Violations with Constitutional Interests*, 45 VAND. L. REV. 273, 277 (1992); *see* Gore v. United States, 357 U.S. 386, 388-93 (1958) (adhering strictly to *Blockburger*, punishing offender on single act which violated three provisions of federal drug law); *see also* American Tobacco Co. v. United States, 328 U.S. 781, 788-89 (1946) (following *Blockburger* strictly to punish conspirators violating two sections of Sherman Act).

[32] 331 U.S. 532 (1947).

[33] *Bayer*, 331 U.S. at 542; *accord* Pinkerton v. United States, 328 U.S. 640, 643 (1946). At common law, the felonious substantive offense was merged with the conspiracy. *Pinkerton*, 328 U.S. at 643. However, this rule generally faded from courts' recognition. *Id. But see* George C. Thomas III, *The Prohibition of Successive Prosecutions for the Same Offense: In Search of a Definition*, 71 IOWA L. REV. 323, 385 (1986) (discussing Model Penal Code deviation from majority's view that conviction of substantive offense and conspiracy caused no double jeopardy violation).

money from lower ranking personnel in exchange for the defendant's performance of certain acts.[34] Following conviction in court-martial proceedings of substantive offenses for this conduct,[35] a federal district court indicted the defendant for conspiracy to defraud the government based on the same acts.[36] The defendant contended that the conspiracy charge was the same offense, for double jeopardy purposes, as the offense convicted by court-martial, but the trial court dismissed his argument.[37] The United States Supreme Court held that overt acts first charged in a conspiracy count and later charged and proved as substantive offenses, did not violate the Double Jeopardy Clause.[38]

Subsequently, the Supreme Court addressed the issue of a defendant's protection under the Double Jeopardy Clause against successive prosecutions of lesser and greater offenses in *Brown v. Ohio*.[39] In *Brown*, the trial court charged and sentenced the defendant after he pled guilty to the offense of joyriding.[40] After serving his sentence, another court indicted

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[34] *Bayer*, 331 U.S. at 541. In exchange for money, the officer agreed to transfer paying personnel to non-combat units. *Id.* at 534-35.

[35] *Id.* at 541. The defendant stood trial for violating certain Articles of War. *Id.* His conviction consisted of conduct unbecoming of an officer, as well as other substantive offenses. *Id.*

[36] *Id.* at 533. The government charged the defendant with conspiracy to defraud by depriving the government of the faithful service of an Army officer. *Id.* For the same offense, the government charged the individuals who paid the officer for effecting the transfers. *Id.* On appeal, the defendants who paid the officer won reversal of their conviction on grounds other than double jeopardy. *Id.* at 537.

[37] *Id.* at 541-42. The trial court found the two charges did not constitute identical offenses. *Id.* The appellate court disagreed with the trial court, but left this issue to be resolved on retrial scheduled because of a question raised about the validity of the military judgment. *Id.*

[38] *Id.* at 542; *accord* Pinkerton v. United States, 328 U.S. 640, 643 (1946); *see* Sneed v. United States, 298 F. 911, 913 (5th Cir.) (holding that punishing overt act supporting conspiracy was not double punishment), *cert. denied*, 265 U.S. 590 (1924). The Court defined conspiracy as "agreement or confederation to commit a crime." *Bayer*, 331 U.S. at 542. Furthermore, if the conspirators made any overt act in pursuit of the agreement, the court punished the offenders whether or not they actually completed the crime. *Id.*

[39] 432 U.S. 161 (1977).

[40] *Brown*, 432 U.S. at 162. The defendant stole a car from a parking lot in East Cleveland, Ohio. *Id.* However, the police arrested him nine days later in

him on joyriding and auto theft.[41] The defendant objected to these counts on the grounds of double jeopardy,[42] but the trial court overruled his objections.[43] The United States Supreme Court granted certiorari and expanded the *Blockburger* test to apply not only to situations of multiple punishment, as in *Blockburger*, but also to situations of successive prosecution.[44] Furthermore, the majority applied the *Blockburger* test and held that joyriding was a lesser included offense of auto theft, because joyriding required no proof beyond that necessary for auto theft.[45] Therefore, the Court concluded that since the greater offense, by definition, was the same as the lesser included offense for double jeopardy purposes, the defendant was correct in his plea of double jeopardy.[46] In conclusion, the *Brown* Court reiterated that the Double Jeop-

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Wickliffe, Ohio, for joyriding, which was the taking of an automobile without the owner's consent. *Id.*

[41] *Id.* at 162-63. The Wickliffe police returned the defendant to East Cleveland to face charges of joyriding and auto theft. *Id.* The county court suspended his six month sentence and placed the defendant on one-year probation. *Id.* at 163.

[42] *Id.* The defendant pled guilty to auto theft on the understanding that the court would consider his claim of double jeopardy on a motion to withdraw the plea. *Id.*; *see* Benton v. Maryland, 395 U.S. 784, 794 (1969) (holding Double Jeopardy Clause applicable to states through Fourteenth Amendment).

[43] *Brown*, 432 U.S. at 163. The state appellate court affirmed the trial court for different reasons. *Id.* at 163-64. The appellate court agreed with the defendant that the two prosecutions involved the same statutory offense for double jeopardy purposes. *Id.* at 164. However, the court upheld both convictions because the defendant's conduct on different dates supported the Wickliffe charge and the East Cleveland charge. *Id.*

[44] *Id.* at 164-66. The prohibition of successive prosecutions served more important purposes than the prohibition of multiple punishments. Richardson, *supra* note 31, at 277. The purposes included preventing the government from harassing defendants at successive trials and from rehearsing presentation of proof at one trial in anticipation of a later one. *Id.*

[45] *Brown*, 432 U.S. at 168. However, the Court noted that the *Blockburger* test was not the exclusive means for determining when successive prosecutions for the same offense were impermissible. *Id.* at 166 n.6; *see* Ashe v. Swenson, 397 U.S. 436, 442-43, 445 (1970) (barring second prosecution on grounds of collateral estoppel).

[46] *Brown*, 432 U.S. at 168-69. The Supreme Court disagreed with the state appellate court's holding that since the defendant's acts on different dates supported the two convictions, the offenses were separate under the Double Jeopardy Clause. *Id.* at 169. The Court stated that prosecutors cannot avoid the Double Jeopardy Clause by carving a single crime into multiple ones simply by specifying different dates of conduct. *Id.* at 169-70.

ardy Clause forbade cumulative punishment or successive prosecution for greater and lesser included offenses, the sequence of which being immaterial.[47]

Thereafter, the Supreme Court redefined the traditional *Blockburger* test in the case of *Illinois v. Vitale*.[48] As in *Brown*, *Vitale* questioned whether a previous conviction for a lesser offense barred later prosecution for the greater offense.[49] In interpreting *Brown*, the Court essentially found that the holding required a two-tiered test to determine whether a greater offense included the lesser one.[50] First, the Court applied the traditional *Blockburger* test.[51] Next, having met the *Blockburger* standard, the Court held that if the State

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[47] *Id.* at 169; *see Ex parte* Nielsen, 131 U.S. 176, 188-89 (1889) (holding conviction of greater offense barred prosecution of lesser one). An exception existed if the prosecutor could not proceed with the more serious charge at the outset because the additional facts necessary to sustain the charge had not occurred or been discovered with due diligence. Diaz v. United States, 223 U.S. 442, 449 (1912); *see* Garrett v. United States, 471 U.S. 773, 791-93 (1985) (holding continuing criminal enterprise not barred by double jeopardy where enterprise was still active during earlier prosecution on predicate offense). The Supreme Court recognized another exception to the *Brown* rule when the defendant elected to have greater and lesser offense charges tried against him separately. Jeffers v. United States, 432 U.S. 137, 152 (1977). In such a case there was no double jeopardy violation when the court honored the defendant's wishes and tried the charges separately. *Id.*

[48] 447 U.S. 410 (1980).

[49] *Vitale*, 447 U.S. at 411. The automobile driven by the defendant struck two children, killing both. *Id.* The circuit court charged and convicted the defendant with failing to reduce speed. *Id.* at 412. The following day, a police officer filed a petition in the same court charging the defendant with involuntary manslaughter. *Id.* at 412-13. The defendant filed a motion to dismiss on grounds of double jeopardy. *Id.* at 413. Without considering the double jeopardy issue, the court granted the motion pursuant to the State's compulsory joinder statutes, and the appellate court affirmed. *Id.* at 413-14. The state supreme court affirmed, basing its holding on the Double Jeopardy Clause of the Fifth Amendment, and stated that the lesser offense of failure to reduce speed required no proof beyond that required for conviction of involuntary manslaughter. *Id.* at 414.

[50] *Id.* at 416-18. The *Vitale* Court then applied this test to the facts of the particular case. *Id.* at 419-21. The Court determined that if the failure to slow always constituted a necessary element of manslaughter by automobile, then the two offenses created a double jeopardy violation under *Brown*. *Id.* at 419-20.

[51] *Id.* at 416-17. The Court stated that under *Blockburger* every element of the lesser included offense must be an element of the greater offense. *Id.* at 419. If each offense required proof of a fact which the other did not, the offenses were not the same for double jeopardy purposes. *Id.* at 416.

relied upon and proved the lesser offense in the pending prosecution for the greater offense, the defendant would have a substantial double jeopardy claim.[52] In addition, the Court stated that if the greater offense did not always entail proof of the lesser one, the two charges were not the same under the *Blockburger* test.[53] The mere possibility that the prosecution would rely on the elements of the lesser offense in proving the greater one did not qualify the charges as the same for double jeopardy purposes.[54]

Gradually, the Supreme Court departed from using *Blockburger* as the primary standard in determining whether successive prosecutions were considered the same offense.[55] As suggested in *Vitale*, the Court created a new definition of same offense, which supplied greater defendant protection under the Double Jeopardy Clause, in *Grady v. Corbin*.[56] Factually similar to *Vitale*, the defendant caused a fatal automobile accident by crossing the median and striking oncoming vehicles.[57] The defendant pled guilty to misdemeanor charges

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[52] *Id.* at 421. The State contended that manslaughter by automobile need not involve any element of failure to reduce speed. *Id.* at 418. Because of doubts concerning the identity of elements between the two offenses, the Supreme Court remanded the case to the state supreme court to resolve the issue in light of the holding of the United States Supreme Court. *Id.* at 421.

[53] *Id.* at 419. By contrast to earlier decisions, the Court applied the *Blockburger* test and focused on actual proof presented at trial instead of merely comparing the statutory elements. David G. Harlow, Note, *The Impact of Expanded Rules for Determining What Constitutes the "Same Offense" for Double Jeopardy Purposes:* Illinois v. Vitale, 1980 B.Y.U. L. REV. 948, 952. As supporting authority, the Supreme Court cited Harris v. Oklahoma, 433 U.S. 682 (1977). *Vitale*, 447 U.S. at 420. The Court in *Harris* held that the Double Jeopardy Clause barred prosecution of a lesser crime after conviction for the greater crime. *Harris*, 433 U.S. at 682; *see* Whalen v. United States, 445 U.S. 684, 694 (1980) (holding conviction of greater offense, killing in course of rape, barred prosecution of lesser included offense, rape).

[54] *Vitale*, 447 U.S. at 419. As justification for its holding, the Court gave examples of when conduct other than failure to slow proved the elements of manslaughter by automobile *Id.* The Court demonstrated that failure to slow may not always constitute a necessary element of manslaughter as required under *Blockburger* and *Brown*. *Id.* at 419-21.

[55] *See* Thigpen v. Roberts, 468 U.S. 27, 32-33 (1984) (raising double jeopardy issue but deciding on other grounds).

[56] 495 U.S. 508 (1990).

[57] *Grady*, 495 U.S. at 511. The police issued two traffic citations related to

which stemmed from the accident.[58] After the sentencing,[59] another court charged the defendant for offenses relating to the death of the other driver.[60] The State admitted that the misdemeanor convictions established essential elements of the homicide indictment.[61] Therefore, Justice Brennan held in the majority opinion[62] that the Double Jeopardy Clause

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this accident to the defendant. *Id.* The first charged him with driving while intoxicated, as his blood alcohol content was nearly twice the level necessary to charge him for this offense. *Id.* The second citation charged him with failure to keep right of the median. *Id.* As a result of injuries sustained in this accident, the driver of the other car died. *Id.*

[58] *Id.* at 512. The prosecutor gathered evidence for the homicide prosecution but failed to inform the justice court or the other members of the district attorney's office of the pending investigation. *Id.* at 511. As a result, the attorney prosecuting the misdemeanors did not mention the death resulting from the accident in his pleadings to the court. *Id.* at 511-12. The defendant pled guilty to the misdemeanors with no member of the district attorney's office present. *Id.* at 512.

[59] *Id.* at 513. The court sentenced the defendant in front of an attorney from the district attorney's office who had no knowledge of the homicide investigation. *Id.* Thus, the Assistant District Attorney recommended the minimum sentence. *Id.* The judge fined the defendant and suspended his license. *Id.*

[60] *Id.* Two months later, a grand jury indicted the defendant for reckless manslaughter, second-degree vehicular manslaughter and criminally negligent homicide. *Id.* The defendant moved to dismiss on double jeopardy grounds. *Id.* at 514.

[61] *Id.* at 513-14. The prosecution filed a bill of particulars setting forth the acts required to prove the homicide. *Id.* This bill included the misdemeanors to which the defendant pled guilty. *Id.*

[62] *Grady*, 495 U.S. at 510. The decision was notably a 5-4 opinion with Justices Brennan, White, Marshall, Blackmun and Stevens comprising the majority. *Id.* at 509; *see* State v. Garner, 601 A.2d 142, 143 n.1 (Md. Ct. Spec. App. 1992) (questioning viability of *Grady* after two members of majority left Court). Justice O'Connor filed a dissenting opinion. *Grady*, 495 U.S. at 524. Likewise, Justice Scalia wrote a dissenting opinion, with which Justices Rehnquist and Kennedy joined. *Id.* at 526. Justice O'Connor argued that the majority ruling contradicted the Court's previous holding in Dowling v. United States, 493 U.S. 342 (1990). *Grady*, 495 U.S. at 524-25. The Court in *Dowling* held that admission of evidence of defendant's prior acquittals did not violate the collateral estoppel component of the Double Jeopardy Clause. *Dowling*, 493 U.S. at 350. After *Grady*, Justice O'Connor argued that the facts of *Dowling* constituted a double jeopardy violation. *Grady*, 495 U.S. at 525-26. Generally, Justice Scalia contended in a lengthy dissent that *Blockburger* provided the appropriate test for determining whether successive prosecutions based on the same conduct violated the Double Jeopardy Clause. *Id.* at 528. Furthermore, Justice Scalia criticized the majority's abandonment of *Blockburger*'s long-accepted precedent and *Grady*'s lack of support. *Id.* at 526-27. Justice Scalia stated that the majority's holding in essence forced prosecutors to observe the explicitly rejected same transaction test. *Id.* at 527.

barred prosecution of such.[63] As in *Vitale*, the Court looked first to the *Blockburger* test and stated that if the statutory elements of the two offenses were identical or one was a lesser included offense of the other, then the Double Jeopardy Clause barred subsequent prosecution.[64] However, the majority stated, as did the *Brown* Court, that the *Blockburger* test was not the exclusive method of determining double jeopardy protection against multiple prosecutions.[65] In response, the Court held that if one offense required proof of previously prosecuted conduct as an essential element, then the Double Jeopardy Clause barred the latter prosecution against the defendant.[66] However, the Court stated that this was not the

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[63] *Id.* at 524. In its conclusion, the majority stated that drunk driving was a national tragedy. *Id.* However, the Justices were mindful that these facts must not deter adherence to the principles set forth in the Constitution. *Id.*

[64] *Id.* at 515-16. The Court expanded the *Blockburger* test rather than explicitly abandoning it. *Id. But see* United States v. Banashefski, 928 F.2d 349, 352 n.1 (10th Cir. 1991) (calling into doubt *Blockburger* approach in light of *Grady*).

[65] *Grady*, 495 U.S. at 519-20. In justifying the use of other methods, the Court recognized that the dangers related to successive prosecutions extended beyond the possibility of multiple punishments. *Id.* at 518. In Green v. United States, 355 U.S. 184 (1957), the Court established the principles supporting the Double Jeopardy Clause. *Green*, 335 U.S. at 187-88. Those principles included the defendant's interest in finality of judgment and the prevention of guilty verdicts against innocent individuals. *Id. See generally* Donald E. Burton, Note, *A Closer Look at the Supreme Court and the Double Jeopardy Clause*, 49 OHIO ST. L.J. 799, 803-05 (1988) (discussing generally ideas and values underlying Double Jeopardy Clause). In addition, the Court determined that successive prosecutions gave the State a chance to rehearse the presentation of evidence at one trial in anticipation of another, thereby increasing the chance of erroneous conviction. *Grady*, 495 U.S. at 518. For these reasons, the Court did not rely solely on *Blockburger* as the standard in the area of multiple prosecutions. *Id.* at 519.

[66] *Id.* at 510. *But see* Detrich v. United States, 924 F.2d 479 (2d Cir. 1991) (holding *Grady* inapplicable to separate charges within single proceeding); United States v. Guariglia, 757 F. Supp. 259, 265 n.1 (S.D.N.Y. 1991) (stating that additions to *Blockburger* by *Grady* were inapplicable to charges in single proceeding). This test, termed the same conduct test, expanded defendant protection and limited prosecutorial abuses in multiple prosecution double jeopardy situations. Sheldon, *supra* note 13, at 37. *Contra* State v. Garner, 601 A.2d 142 (Md. Ct. Spec. App. 1992) (finding no double jeopardy violation when defendant was responsible for successive prosecution). However, lower courts have differed in the application of *Grady* in situations such as a conspiracy charge. *Compare* United States v. Rivera-Feliciano, 930 F.2d 951, 954 (1st Cir. 1991) (allowing conspiracy prosecution based on previously prosecuted conduct), *cert. denied*, 112 S. Ct. 1676

same evidence or actual evidence test, but rather an examination of the conduct the prosecution would prove at trial.[67]

In the instant case, the United States Supreme Court stated that since the introduction of evidence of misconduct in a case is not the same as a prosecution for that conduct,[68] the overlap in proof between two prosecutions did not establish a double jeopardy violation.[69] In addition, the Court concluded that since the conspiracy to commit a crime[70] and the actual commission of the crime itself were separate and distinct actions for purposes of the Double Jeopardy Clause,[71] a separate prosecution for each such offense was not a double jeopardy violation.[72] Furthermore, the Court determined that the conspiracy and the offense were separate and distinct offenses, and therefore the essential element test and the lesser included offense analysis[73] were not applicable.[74] In

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(1992), *with* United States v. Calderone, 917 F.2d 717, 722 (2d Cir. 1990) (barring conspiracy prosecution after broader encompassing previous conspiracy prosecution), *cert. granted*, 112 S. Ct. 1657 (1992). As to the particular facts of *Grady*, the Court held that under the same conduct test the homicide prosecution violated the Double Jeopardy Clause. *Grady*, 495 U.S. at 524. However, under the *Blockburger* test, the prosecution could try the defendant for each homicide offense charged. *Id.* at 522.

[67] *Id.* The critical evidence was the conduct the State would prove at trial, not the evidence used to prove the conduct. *Id.* at 521-22. The majority did not overrule the holding set out in *Dowling* which stated that the introduction of evidence at one trial did not bar subsequent introduction of that evidence at a later trial. *Id.* Furthermore, Justice Brennan explained that the term same evidence as attached to *Blockburger* was a misnomer. *Id.* at 522 n.12. *Blockburger* focused on statutory elements of the offenses charged, not evidence presented at trial. *Id.*

[68] United States v. Felix, 112 S. Ct. 1377, 1383 (1992). The Court concluded that evidence of misconduct could be admitted at trial as prior acts evidence under FEDERAL RULE OF EVIDENCE 404(b). *Felix*, 112 S. Ct. at 1383.

[69] *Id.* at 1382. The Justices followed well-established precedent and concluded that offering acts of misconduct as evidence in one prosecution did not bar a later criminal charge for those acts under the Double Jeopardy Clause. *Id.*

[70] *Id.* at 1384. The Court recognized that conspiracy was "the agreement or confederation to commit a crime." *Id.* at 1384 (quoting United States v. Bayer, 331 U.S. 532, 542 (1947)).

[71] *Felix*, 112 S. Ct. at 1384. The Court concluded that the prosecutor could charge and prove the same overt acts supporting a conspiracy charge and the substantive offense without violating the Double Jeopardy Clause. *Id.* The Court explained that the two offenses were separate and distinct. *Id.*

[72] *Id.* at 1385. The Court followed long-established precedent in holding that the conspiracy and the offense were separate and distinct. *Id.* at 1383-84.

[73] *Id.* at 1385. The Court stated that under the essential element test, the

conclusion, the Supreme Court found that since conspiracy to commit an offense and the commission of that offense were separate and distinct under the Double Jeopardy Clause, then the Oklahoma trial court's conviction of the respondent was correct.[75]

The United States Supreme Court's decision in *Felix* follows one line of precedent in application of the Double Jeopardy Clause to prosecution of a conspiracy charge supported by previously prosecuted overt acts.[76] Faced with reconciling previous decisions on double jeopardy violations, the Court chooses to keep the doctrine separating the conspiracy to commit the crime from the commission of the crime itself, distinct from the line of cases developing various tests to determine when a double jeopardy violation occurs.[77] In doing so, the Court relies solely on the long-standing rule of precedent determining that the conspiracy and the crime are not the same offense for double jeopardy purposes.[78] By contrast, the Court struggles to interpret the relationship between other offenses for double jeopardy purposes through a series of unworkable tests.[79] This result is an inconsistent method of determining

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Double Jeopardy Clause barred a prosecution only if the offense required proof of the defendant's previously prosecuted conduct as an essential element. *Id.* at 1383. The majority determined that the commonly used lesser included offense analysis was more helpful in the context of a single course of conduct, than in the situation of multilayered conduct. *Id.* at 1385. An example of multilayered conduct was a conspiracy charge supported by previously prosecuted overt acts. *Id.*

[74] *Id.* The Court held that the conspiracy and the crime were best kept as separate offenses. *Id.*

[75] *Id.* The United States Supreme Court reversed the decision of the United States Court of Appeals for the Tenth Circuit, thus reinstating the decision of the trial court which convicted the respondent of both conspiracy and the substantive offenses. *Id.* Justice Stevens wrote a concurring opinion, joined by Justice Blackmun, agreeing with the majority's judgment and reason for the reversal of the substantive offenses. *Id.* at 1386. However, by relying on the essential element test, Justice Stevens argued that since the federal drug conspiracy statute required no overt act to convict the defendant, then an overt act did not constitute an "essential element" of the conspiracy as required to forbid prosecution under the Double Jeopardy Clause. *Id.*

[76] *See supra* notes 33, 38, and accompanying text.

[77] *See supra* notes 16, 30, 31, 33, 38, 66, 70, 71, and accompanying text.

[78] *See supra* notes 33, 38, 70-72, and accompanying text.

[79] *See supra* notes 19, 23, 30, 31, 46, 53, 66, and accompanying text.

which offenses are forbidden from prosecution.[80] The Court appears to be steadfast in its adoption of the conspiracy doctrine, but is not so strongly taken to the most recent same offense test.[81] Although this discrepancy will ultimately lead t o more conflict, the Court realistically applies the correct theory as entangling the conspiracy doctrine with the most recent same offense test in the present confused state of double jeopardy interpretation would only cause more difficulties.[82] However, the Double Jeopardy Clause by definition poses a conflict between important policies of defendant protection from multiple prosecution and punishment, and society's need to punish the wrongdoer.[83] In struggling to reach a balance, the Court is forced to sacrifice one policy for the greater good of the other.[84] The combination of these inadequacies will surely lead to additional double jeopardy conflict requiring the Supreme Court's reconciliation.[85]

Carmen Shindala

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[80] *See supra* notes 19, 33, 38, 66, and accompanying text.
[81] *See supra* notes 33, 38, 62, 66, 70-72, and accompanying text.
[82] *See supra* notes 19, 62, 66 and accompanying text.
[83] *See supra* notes 18, 19, 65, and accompanying text.
[84] *See supra* notes 50, 63 and accompanying text.
[85] *See supra* notes 19, 62, 66, and accompanying text.

EVIDENCE—REFRESHED RECOLLECTION TESTIMONY—WITNESS MUST REFRESH MEMORY BY A WRITING OR SOME TANGIBLE EVIDENCE

Debtor[1] filed suit against the creditor[2] and trustee[3] in the Chancery Court of Washington County, Mississippi for wrongful foreclosure on debtor's real property.[4] The debtor objected to the testimony of one witness[5] who refreshed his memory[6] by talking to another witness.[7] The debtor contended that the witness' refreshed recollection testimony was merely repetitive of what another witness told him.[8]

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[1] The debtor was Don A. Hall. Eastover Bank For Sav. v. Hall, 587 So. 2d 266, 267 (Miss. 1991).

[2] *Hall*, 587 So. 2d at 267. The creditor was Eastover Bank. *Id.*

[3] *Id.* The trustee was Charles Mayfield, Junior. *Id.*

[4] *Id.* Don Hall bought real property in Washington County, Mississippi. *Id.* Eastover held the deed of trust on the property. *Id.* Hall fell behind on his mortgage payments and Eastover appointed Charles Mayfield as substitute trustee to execute the foreclosure proceedings. *Id.* Mayfield scheduled the foreclosure sale for July 21, 1988. *Id.* Don Hall and his nephew, Freddie Hall went to the Washington County Courthouse on July 21, 1988 around 10:45 a.m. *Id.* After finding that the foreclosure sale had not taken place, both men remained at the courthouse until around 12:55 p.m. when Don Hall went to the bank to pay the amount due on the mortgage. *Id.* at 267-68. Freddie Hall remained at the courthouse. *Id.* at 268. After Don Hall deposited the amount due on the mortgage into the trustee's account, he returned to the courthouse and met Freddie Hall. *Id.* Both men waited about thirty minutes and left the courthouse around 2:00 p.m. *Id.*

[5] *Id.* at 270. The witness was Michael Boyd. *Id.* Mayfield hired Boyd to conduct the foreclosure sale. *Id.* at 268.

[6] *Id.* at 270. The deposition testimony of the witness, Michael Boyd, taken months before trial, reflected that he could not remember many details about the day when he conducted the foreclosure sale. *Id.* However, at the trial, Boyd testified that he remembered the events of the day "very well." *Id.* at 268. Boyd claimed he refreshed his memory by talking with Mischa Harper, who allegedly assisted Boyd with the foreclosure sale. *Id.* at 270.

[7] *Hall*, 587 So. 2d at 270. The witness was Mischa Harper. *Id.*

[8] *Id.* During the deposition, Boyd said he recalled conducting the foreclosure between 1:00 and 2:00 p.m. on the afternoon of July 21, 1988. *Id.* After having his memory refreshed, Boyd testified that, around noon of the same day, he visited some friends for "two or two and a half hours" and then went to the courthouse to conduct the foreclosure sale. *Id.* This testimony would have put

The lower court sustained the objection and entered judgment for the debtor.[9] On appeal, the Mississippi Supreme Court, *held*, affirmed.[10] Where a witness refreshes his memory by an out-of-court statement, rather than by a writing or some form of tangible evidence, the court should exclude the witness' testimony from trial. *Eastover Bank For Savings v. Hall*, 587 So. 2d 266 (Miss. 1991).

As early as 1660,[11] English courts recognized the use of a writing to refresh a witness' memory.[12] In 1817,[13] courts in the United States followed the English common law.[14] The Mississippi Supreme Court encountered the issue of using a writing to refresh a witness' memory in *New Orleans, Jackson and Great Northern Railroad v. Echols*.[15] In *Echols*, the plaintiff, after filing suit, prepared a list of materials used on a construction project.[16] On direct of examination, the plain-

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the time of the sale past 2:00, after Don and Freddie Hall had left the courthouse. *Id.* Hall contended that the refreshed testimony of Michael Boyd was hearsay and that the Court should exclude it from trial. *Id.*

[9] *Id.* The lower court first ruled that the debtor had properly tendered payment of the debt when he deposited the amount owed on the mortgage in the trustee's account. *Id.* The lower court then sustained the debtor's objection to Boyd's refreshed testimony about the time of the foreclosure sale. *Id.*

[10] *Id.* at 270-71. The court first affirmed the lower court's determination that the debt was paid and then affirmed the lower court's decision to sustain the objection of Boyd's testimony. *Id.*

[11] 3 WIGMORE, EVIDENCE § 735 (Chadbourn rev. 1970). English reports reflected the use of writings used to refresh a witness' memory early in the history of reported trials. *Id.* In these early cases, the English courts imposed no restrictions on a witness' use of a writing to refresh his memory. MCCORMICK, EVIDENCE § 9 (3rd ed. 1984).

[12] 3 WIGMORE, EVIDENCE § 735 (Chadbourn rev. 1970). Wigmore cited three English cases from the 1600's in which a court allowed witnesses to use a list of names to refresh his memory. *Id.*

[13] *Id.* The Supreme Court of South Carolina was the first court in the United States to recognize the use of a writing to refresh a witness' memory. *Id.*

[14] *Id.* The *Pearson* court found that a witness could refer to his signature on a will to refresh his memory, even though he had no independent recollection of signing it. *Id.*; *see* Shove v. Wiley, 35 Mass. (18 Pick.) 558, 561 (1836) (allowing witness to refer to handwritten recordings of business transactions to refresh memory).

[15] 54 Miss. 264 (1876).

[16] *Echols*, 54 Miss. at 271. The defendant hired the plaintiff to construct a water tank and later repudiated the contract. *Id.* at 268. Two years later, the plaintiff filed suit to recover for breach of contract. *Id.* at 268-69. Because he

tiff gave the estimated costs of the materials in his testimony, but on cross-examination the plaintiff could not give the costs of the materials from memory, even after looking at the bill of particulars.[17] The defendant moved to exclude all of the witness' testimony.[18] The Mississippi Supreme Court held that the lower court properly overruled the defendant's motion and found that the plaintiff could testify as to the costs of the materials without the aid of the writing.[19] The court in *Echols* also established the requirement that a witness must have recorded the events in question "at or near the time" they occurred before he could refer to the writing in his testimony.[20] The court concluded that the plaintiff could not refer directly to the writing because the plaintiff prepared the list two years after he incurred the expenses and *post litem motam*.[21]

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lacked the original invoices of the cost of materials used on the project, Echols made an estimate of the materials. *Id.* at 270.

[17] *Id.* The court determined that the plaintiff's inability to recall the estimated costs on cross-examination may have weakened his testimony but did not render it incompetent. *Id.*

[18] *Id.* The basis for the defendant's motion to exclude the witness' testimony was that the witness lacked sufficient knowledge to testify. *Id.*

[19] *Id.* The court held that the plaintiff could testify as to the costs of the materials because he had once stated the costs from memory on direct examination. *Id.*

[20] *Id.* at 271. In holding that a witness must have made the writing "at or about" the time of the transaction, the court sought to establish a safeguard against a witness using an unreliable memoranda in his testimony. *Id.*; *see* J.H. Leavenworth & Son, Inc. v. Hunter, 116 So. 593, 595 (Miss. 1928) (holding witness could testify as to number of trees cut from memorandum made at that time); Hasie v. Alabama & V. Ry., 28 So. 941, 942-43 (Miss. 1900) (permitting train conductor to refresh memory from report made on day of accident). *See generally* 3 WIGMORE, EVIDENCE § 745 (Chadbourn rev. 1970) (explaining general rule that witness must have made writing near time of event); Dillard S. Gardner, *The Perception and Memory of Witnesses*, 18 CORNELL L.Q. 391, 392-93 (1933) (discussing effect of recency on memory); M. C. Dransfield, Annotation, *Refreshing Recollection of Witness*, 125 A.L.R. 19, 21 (1940) (discussing requirement that witness make writing at or about time of event).

[21] *Echols*, 54 Miss. at 271. The court determined that the purpose of making a writing in recording a transaction was to preserve the truth. *Id.* The court then held the witness had not made the memorandum to preserve the truth because he made it after the suit was filed and two years after the witness incurred the expenses. *Id.* The *Echols'* requirement that the witness make the writing contemporaneously with the event followed a general rule recognized in most jurisdictions. 3 WIGMORE, EVIDENCE § 745 (Chadbourn rev. 1970). Courts

While the *Echols* court focused more on the requirements governing a writing to which a witness referred during testimony, the Mississippi Supreme Court, in *Cooper v. State*,[22] focused more on the witness' memory.[23] In *Cooper*, an elderly man had witnessed a murder and promptly made a written account of it.[24] Upon direct examination in the lower court, the witness said that he had no recollection of the events independently of the writing, but that he knew he wrote down the facts correctly.[25] The *Echols* requirement, that the witness made the writing at the time of the event, was met in *Cooper* because the witness recorded the event on the day it occurred.[26] The *Cooper* court determined that the lower court properly admitted the witness' testimony because the witness knew he had an impaired memory and had made the memorandum at the time of the event in order to remember the facts.[27] The court in *Cooper* determined that a witness, who

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used phrases such as "contemporaneously with the event," "at or near the time" and "shortly afterwards" in stating the rule. *Id.* These phrases provided no accurate test, and most courts' decisions turned upon the circumstances of each individual case. *Id.*; *see* Putnam v. United States, 162 U.S. 687, 696-97 (1896) (holding that witness could not use writing made four months after event to refresh memory); Martin v. State, 19 So. 2d 488, 490 (Miss. 1944) (determining witness could not use writing made over one year after event). *See generally* 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 438 (1972) (discussing fact that circumstances of each particular case determined if writing was made contemporaneously with event).

[22] 59 Miss. 267 (1881).

[23] *Cooper*, 59 Miss. at 272-73. The court in *Cooper* focused on the competency of the witness' ability to remember the facts in the writing. *Id.*

[24] *Id.* at 268. The 80-year-old witness, after witnessing a stabbing, immediately wrote down the event he had witnessed and kept the memorandum with him. *Id.*

[25] *Id.* at 272. Although on direct examination the witness testified that he could not remember the event independent of the memorandum, the witness testified that he took great care to write the facts down correctly because he knew his memory was short. *Id.* at 272-73. Upon cross-examination, the witness testified that he could recall much of the events after he read the memorandum. *Id.* at 273.

[26] *Id.* at 272. The *Cooper* court determined that the witness could use the writing to refresh his memory because he wrote down the event while it was still fresh in his mind. *Id.*

[27] *Id.* The court found that the witness was able to give an intelligent account of the events after he referred to the writing. *Id.* The majority of courts regarded a memorandum written soon after an event as being more reliable than

recorded an event "at or near" the time it happened and testified that the writing was correct, could use the writing to refresh his memory.[28] The *Cooper* court held that a witness could use such a writing even if he had no recollection of the event independent of the writing.[29]

In *Alabama & Vicksburg Railway v. Coleman*,[30] a witness with no personal knowledge of a shipment testified as to specifics of the shipment, using copies of the original record made by another.[31] The Mississippi Supreme Court determined that a witness could use a writing to refresh his memory only when the witness made the memorandum himself or someone under his direction made it.[32] The court in *Coleman*

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the actual memory of the witness at trial. Recent Decisions, *Evidence-Supplementing Memory-Requirement That Present Recollection Be First Exhausted*, People v. Weinberger, 25 COLUM. L. REV. 498, 498 (1925).

[28] *Cooper*, 59 Miss. at 272. The court determined that the witness could use the writing to refresh his memory because the witness testified that the writing was correct and that he knew it to be true at the time he made it. *Id.*; *see* Aetna Ins. Co. v. Weide, 76 U.S. (9 Wall.) 677, 680 (1869) (holding witness who testified that records were correct could refresh memory from records); Pearson v. State, 167 So. 644, 648 (Miss. 1936) (allowing witness to refresh memory from writing he testified was correct); Alabama & V. Ry. v. Sol Fried Co., 33 So. 74, 75 (Miss. 1902) (holding witness could refresh memory from book entries sworn to be correct); Jackson v. State, 5 So. 690, 692 (Miss. 1888) (permitting witness to refresh memory from report after he testified it was correct).

[29] *Cooper*, 59 Miss. at 272. The witness in *Cooper* testified that "he knew nothing only as he read it from a paper he held in his hand . . . ." *Id.* The witness could not remember any of the events, but could only remember that he made a writing of the event and that it was correct. *Id.* Some have criticized courts for labeling such testimony as "refreshed recollection" and contended that such testimony was only a substitute for present memory. Edmund M. Morgan, *The Relation Between Hearsay and Preserved Memory*, 40 HARV. L. REV. 712, 718-19 (1927).

[30] 28 So. 828 (Miss. 1900).

[31] *Coleman*, 28 So. at 828-29. The lower court allowed the plaintiff to testify regarding shipments about which he swore he knew nothing. *Id.* The plaintiff also testified that the papers he referred to were not original records, but were copies made by another employee. *Id.* at 829.

[32] *Id.* The *Coleman* requirement that the witness made the writing, or that someone under his direction made it, was a general rule which most courts followed. 3 WIGMORE, EVIDENCE §§ 747-48 (Chadbourn rev. 1970). As to cases where the witness did not swear that the writing refreshed his memory, courts strictly required that the witness made the writing and knew it was correct. Robert M. Hutchins & Donald Slesinger, *Some Observations on the Law of Evidence-Memory*, 41 HARV. L. REV. 860, 862 (1928).

determined that such a requirement was necessary to insure that the witness knew that the facts contained in the writing were true.[33] The *Coleman* court found that because the witness never had any personal knowledge of the transaction, he never had any memory that a writing could refresh.[34] *Coleman* established the requirement that a witness must have had personal knowledge that a writing was correct before the writing could be used to refresh his memory.[35]

The court in *Potts v. McPeters*[36] abandoned the *Coleman* requirement.[37] In *McPeters*, a witness used a list of material to refresh his memory and the defendant objected to the witness' testimony because the witness had not proven the list was correct.[38] The lower court sustained the objection and excluded the witness' testimony.[39] The Mississippi Supreme

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[33] *Coleman*, 28 So. at 829. The *Coleman* court determined that if the witness made the writing, he would personally have known the truth of the facts contained in it. *Id.* The purpose of such a requirement was to insure that witnesses only used accurate writings to refresh their memory. John M. Maguire & Charles W. Quick, *Testimony: Memory and Memoranda*, 3 HOW. L.J. 1, 4 (1957). When the witness did not make the writing himself, there arose the risk that the writing was the perception of the author, rather than of the witness himself. *Id.*

[34] *Coleman*, 28 So. at 829. The court in *Coleman* found that the witness' testimony was not substantive proof as to the truth of facts contained in the writing because the witness did not make the writing. *Id.*

[35] *Id.* The *Coleman* court determined that the witness could not use the records to aid his memory because the witness testified that he did not know if the records were correct. *Id.*; *see* Chaffee & Co. v. United States, 85 U.S. (18 Wall.) 516, 543 (1873) (holding witness who had no personal knowledge that writing was correct could not refer to it); Hoye v. Newton Lumber & Mfg. Co., 54 So. 839, 839 (Miss. 1911) (holding witness could not refer to records not known to be correct); Chicago, St. L., and N. O. R.R. v. Provine, 61 Miss. 288, 292-93 (1883) (holding witness could not refer to writing which he could not verify as correct). *See generally* Dransfield, *supra* note 20, at 124 (stating general rule that witness required to know that writing was correct).

[36] 103 So. 202 (Miss. 1925).

[37] *McPeters*, 103 So. at 202-03. The court held that the *Coleman* requirement, that the witness knew that the records were correct before the witness could introduce them into evidence, did not apply when the witness only used the writing to refresh his memory. *Id.*

[38] *Id.* at 202. The defendant objected to the witness' testimony on the grounds that it was unreliable because the witness did not prove the books were correct. *Id.* The defendant stressed the requirement that, before a witness could introduce a writing as proof of what was contained therein, the witness must have proven that the writing was correct. *Id.*

[39] *Id.* The lower court sustained the defendant's objection and granted a pe-

Court disagreed with the lower court and determined that the witness did not attempt to introduce the writing into evidence, but was only trying to refresh his memory.[40] The court found that the rule, requiring a writing to be correctly kept before it was admissible into evidence, was inapplicable when a witness only sought to refresh his memory from the writing.[41] The *McPeters* court held that a witness could refer to a writing to clarify his testimony as to facts he knew independently of the writing, even though the writing was inaccurate and may not have been admissible into evidence.[42]

The Mississippi Supreme Court, in *Cutshall v. State*,[43] clarified and further expanded this rule, when the court clearly defined "present recollection revived" and "past recollection recorded."[44] The court found that if the writing revived the present memory of the witness, he must have testified from his refreshed memory without the aid of the writing.[45] The

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remptory instruction to the jury in favor of the defendant. *Id.*

[40] *Id.* The court found that the witness only attempted to refresh his memory in order to give a more definite account of the facts he knew independently of the writing. *Id.*

[41] *Id.* at 202-03. The court determined that the witness had made the writing at the time of the event. *Id.* The court held that the witness had a right to refresh his memory from the writing because he had personal knowledge of the event and he made the writing at the time the event occurred. *Id.*

[42] *McPeters*, 103 So. at 202-03. The court determined that the witness could refresh his memory with the writing despite the fact that the witness did not prove the writing was accurate and reliable. *Id.*; *see* Nabors v. Goldforb, 27 So. 641, 641 (Miss. 1900) (determining that witness could testify to facts known independently of writing, even though party did not introduce writing into evidence). *See generally* 3 WIGMORE, EVIDENCE § 747 (Chadbourn rev. 1970) (discussing rule of witness verifying correctness of writing).

[43] 35 So. 2d 318 (Miss. 1948).

[44] *Cutshall*, 35 So. 2d at 322. Wigmore proposed the terms "present recollection revived" and "past recollection recorded," referred to by the court in *Cutshall*, as an improvement over the vague wording used by courts to refer to refreshed memory. Maguire & Quick, *supra* note 33, at 2 n.2. *See generally* William G. Hale, *The Use by a Witness of His Prior Testimony for the Purpose of Refreshing Recollection*, 15 ST. LOUIS L. REV. 137, 140-50 (1930) (discussing present recollection and past recollection recorded); Morgan, *supra* note 29, at 717-18 (discussing different forms of refreshed memory); BLACK'S LAW DICTIONARY 1124-25 (6th ed. 1990) (defining past recollection recorded).

[45] *Cutshall*, 35 So. 2d at 322. The court referred to testimony revived by a writing as "present recollection revived." *Id.* "Present recollection revived" referred to when the writing only stimulated the witness' mind in order for the

court also found that a witness with personal knowledge of an event who knew he had made an accurate record of it, could refer to the writing in his testimony, even if he could recall these facts independently.[46] The court finally determined that a witness who had personal knowledge that the writing was correct could testify directly from the writing as long as he had no present independent recollection of the event after reviewing the writing.[47] In *Cutshall*, the court determined that the lower court properly allowed the witness to review a statement he had given to officers and then testify without consulting the statement.[48] The *Cutshall* court's recognition of "present recollection revived" and "past recollection recorded" was not unique, as the terms were widely used in other jurisdictions.[49] Although *Cutshall* defined "past recollection recorded," the opinion was unclear as to the necessary requirement for a witness to testify directly from "past recollection

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witness' memory to reach presently beyond the writing to the facts of the event. Hale, *supra* note 44, at 137-39.

[46] *Cutshall*, 35 So. 2d at 322. This testimony was similar to "present recollection revised," in that the witness may have had memory of the event independent of the writing. *Id.* The *Cutshall* court distinguished this testimony from "present recollection revived" because, unlike "present recollection revived," the witness could refer to the writing in his testimony if the witness made the writing at time of the event and knew it was correct. *Id.*

[47] *Id.* The *Cutshall* court determined that a witness, who had no memory of facts independent of the writing, could testify directly from a writing of "past recollection recorded." *Id.* The court found that a writing qualified as "past recollection recorded" if the witness had personal knowledge of the facts contained in the writing, and he knew the writing was correct. *Id.* When a witness testified using "past recollection recorded," his memory attached entirely to the writing. Hale, *supra* note 44, at 137-39. When a witness testified from "past recollection recorded," he offered the memorandum as an expression of his former memory. *Id.*

[48] *Cutshall*, 35 So. 2d at 322. The court determined that the testimony given by the witness was "present recollection revived." *Id.* The court also held that the evidence contained in the writing did not go before the jury, because the witness testified from his refreshed memory independent of the writing. *Id.*; *see* Westmoreland v. State, 177 So. 273, 273 (Miss. 1937) (holding witness could testify from independent recollection after memory refreshed from writing); Finley v. Armstrong, 78 So. 177, 178 (Miss. 1918) (determining bookkeeper could refer to books and testify independently); Green v. Irving, 54 Miss. 450, 466 (1877) (holding witness could refer to writing and testify independently).

[49] Maguire & Quick, *supra* note 33, at 2 n.2. The terms proposed by Wigmore had become almost universally employed in courts. *Id.*

recorded."[50]

In *Scott v. State*,[51] the Mississippi Supreme Court clearly stated the predicate necessary for a witness to testify directly from "past recollection recorded."[52] In *Scott*, the lower court allowed a police officer to read a witness' statement from his notes in an attempt to impeach the witness.[53] The Mississippi Supreme Court determined that the lower court should not have permitted the police officer to read directly from the writing because he never admitted his memory was faulty.[54] The *Scott* court held that a witness must have had no present memory of the event before he could read from a writing of the event.[55] Although the *Scott* court determined that the police officer could not refer to his records, the Mississippi Supreme Court subsequently held that when a police officer had no present memory of an event, the officer could refer directly to his records of the event.[56]

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[50] *Cutshall*, 35 So. 2d at 322. The court clearly defined the term "past recollection recorded," but did not firmly establish a requirement for allowing a witness to testify directly from "past recollection recorded." *Id.*

[51] 446 So. 2d 580 (Miss. 1984).

[52] *Scott*, 446 So. 2d at 585. The *Scott* court cited *Cutshall* as establishing the requirement which enabled a witness to use a writing to refresh his recollection, but the court went on to clarify the requirement. *Id.*

[53] *Id.* The lower court allowed a police officer to read directly from a statement he had taken from a witness. *Id.* The defendant objected to the officer's testimony, but the lower court overruled the objection. *Id.*

[54] *Id.* The court determined that the officer's testimony was inadmissible because the police officer had begun reading from his notes without ever having acknowledged his memory was faulty. *Id.* The *Scott* court limited the circumstances when a witness could directly refer to a writing in his testimony by requiring that the witness first have had no present memory of the event. *Id.*; *see* Vicksburg & M. R.R. v. O'Brien, 119 U.S. 99, 102 (1886) (holding physician could not refer to notes because he did not testify that he had no present recollection of facts).

[55] *Scott*, 446 So. 2d at 585. The Mississippi Supreme Court held that a witness could refresh his memory from a writing of an event only if he had no present recollection of the event. *Id.* The *Scott* court also held that if the witness wrote down the event when it occurred and testified that it was a true account of the event, then a witness could directly testify from the writing to refresh his memory. *Id.*; *see* Pearson v. State, 167 So. 644, 648 (Miss. 1936) (holding witness could testify directly from writing if she testified it was correct); Bell v. State, 43 So. 84, 85 (Miss. 1907) (allowing witness to refer directly to writing after he testified he had written event down correctly).

[56] *Graves v. State*, 492 So. 2d 562, 564-65 (Miss. 1986). In *Graves*, a police

In *Livingston v. State*,[57] the Mississippi Supreme Court discussed Rule 612 of the Mississippi Rules of Evidence.[58] The *Livingston* court first determined that the pre-rules precedent in Mississippi permitted a witness to refresh his memory from a memorandum[59] and that Rule 612 broadened the precedent.[60] Rule 612 broadened the pre-rules precedent by eliminating the requirement that a witness must have complied with the past recollection recorded exception to the hearsay rule before he could use a writing to refresh his memory.[61] The *Livingston* court then determined, before the Mis-

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officer testified directly from his police report. *Id.* The Mississippi Supreme Court determined that his testimony was admissible. *Id.* The *Graves* court distinguished the case from *Scott* because, unlike the officer in *Scott*, the officer in *Graves* had no present memory of the event. *Id.*

[57] 525 So. 2d 1300 (Miss. 1988).

[58] *Livingston*, 525 So. 2d at 1303. Although the lower court tried the case before the effective date of the Mississippi Rules of Evidence, the Mississippi Supreme Court found it necessary to interpret Rule 612. *Id.* Rule 612 of the Mississippi Rules of Evidence states:

> If a witness uses a writing to refresh his memory for the purpose of testifying, either (1) while testifying, or (2) before testifying, if the court in its discretion determines it necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce into evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

MISS. R. EVID. 612.

[59] *Livingston*, 525 So. 2d at 1303. The *Livingston* court first stated that even before the effective date of the Mississippi Rules of Evidence, Mississippi courts allowed a witness to refresh his memory from a writing. *Id.*; *see* Meyer v. Blakemore, 54 Miss. 570, 584 (1877) (holding that witness could refer to papers to refresh memory).

[60] *Livingston*, 525 So. 2d at 1303. The court cited the official comment to Rule 612 in determining that Rule 612 broadened the pre-Rules precedent. *Id.* Rule 612 broadened the pre-Rules precedent by allowing a witness to have used any writing to refresh his memory. MISS. R. EVID. 612, comment.

[61] MISS. R. EVID. 612, comment. Before the effective date of the Mississippi

sissippi Rules of Evidence were to take effect, that a witness who had no memory of an event could refresh his memory from a writing, even if the writing was inadmissible into evidence.[62] In *Livingston*, a detective testified that he had no present memory, but he could refresh his memory if he could view a photograph rather than a writing.[63] The *Livingston* court expanded Mississippi's common law of evidence by holding that a witness could use a photograph to refresh his memory, even if the photograph was not admissible into evidence.[64]

Rules of Evidence a witness had to comply with the hearsay exception. *Id.* The exception required that the writing should have been "past recollection recorded," which mandated that the witness, or someone under his direction, made the writing. *Id.*

[62] *Livingston*, 525 So. 2d at 1303. The *Livingston* court determined that the necessary predicate was that the witness must have had no present memory of the event and that present memory could have been refreshed from the writing. *Id.* The court also determined that a witness could use the writing, even if the court did not permit the writing into evidence. *Id.*; *see* Gardner v. State, 455 So. 2d 796, 799 (Miss. 1984) (permitting witness to read notes even though court did not allow notes into evidence); King v. State, 342 So. 2d 892, 893 (Miss. 1977) (permitting witness to read notes of another to jury when court did not permit notes into evidence); Rawls v. State, 120 So. 211, 213 (Miss. 1929) (permitting witness to refresh memory by referring to waybill that court did not allow into evidence).

[63] *Livingston*, 525 So. 2d at 1303. The witness testified that he had no present memory of what the defendant looked like, but a photograph could refresh his memory. *Id.* The court determined that the witness met the pre-rules predicate for a witness to testify directly from a writing. *Id.* The predicate was that a witness must have had no present memory of the event and that the writing could refresh his memory. *Id.* The *Livingston* court then stated that the Mississippi Supreme Court had never held that a witness could use a photograph to refresh his memory, but it was "generally considered to be acceptable." *Id.*

[64] *Id.* The court relied on the federal rule which had been interpreted as not requiring a witness to specifically use a writing to refresh his memory. *Id.*; *see* United States v. Kusek, 844 F.2d 942, 949 (2d Cir.) (holding witness could refresh memory from tape recording of conversation), *cert. denied*, 488 U.S. 860 (1988); United States v. Rappy, 157 F.2d 964, 967 (2d Cir. 1946) (permitting witness to refresh memory by "a song, a scent, a photograph, all allusion, even a past allusion, even a past statement known to be false."), *cert. denied*, 329 U.S. 806 (1947). *See generally* MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE, § 612.1 (1981) (allowing use of leading questions to refresh witness' memory); MCCORMICK, EVIDENCE § 9 (3d ed. 1984) (permitting witness to refresh memory with image or statements heard or read); 2 James W. Moore et al, MOORE'S FEDERAL PRACTICE § 612.5 (2d ed. 1985) (permitting witness to refresh

In the instant case, the Mississippi Supreme Court determined that since Rule 612 of the Mississippi Rules of Evidence mandates a writing or other tangible evidence to refresh a witness' recollection testimony,[65] then the court would exclude from evidence a witness' refreshed recollection testimony based only on a conversation with another witness.[66] The court reasoned that since allowing a witness to testify after refreshing his memory solely by talking with another witness would circumvent the prohibition against hearsay testimony, then courts should exclude such testimony from trial.[67] In the case at hand, the Mississippi Supreme Court relied on Rule 612 and concluded that since only an out-of-court conversation refreshed the witness' recollection testimony, then the lower court was proper in excluding such testimony from trial.[68]

While the pre-rules precedent in Mississippi was unclear as to what methods a witness could use to refresh his memory before testifying, the court in *Eastover* established specific limitations for these methods.[69] Prior to the effective date of the Mississippi Rules of Evidence, Mississippi courts approached this issue on a case-by-case basis.[70] By designating Rule 612 of the Mississippi Rules of Evidence as the "only mechanism" in the rules of evidence for refreshing a witness' memory, the court in *Eastover* provided a uniform rule which Mississippi courts can apply when adjudicating cases involving a witness' refreshed memory.[71] *Eastover*'s holding that Rule 612 is "clearly limited to a writing, or in the most expan-

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memory from illegally obtained tapes of phone conversations).

[65] Eastover Bank For Sav. v. Hall, 587 So. 2d 266, 270 (Miss. 1991). The court interpreted Rule 612 as allowing a witness to refresh his testimony by a writing "or in the most expansive view, some tangible thing." *Id.*

[66] *Id.* at 271. The court determined that Rule 612 required a writing to be the basis for a witness' refreshed recollection testimony. *Id.*

[67] *Id.* The court found no case where a court allowed a witness to refresh his memory and testify solely on what another witness had told him. *Id.*

[68] *Id.* The court determined that Rule 612 did not apply to out-of-court conversations used to refresh a witness' memory. *Id.*

[69] *See supra* note 66 and accompanying text.

[70] *See supra* note 21.

[71] *See supra* notes 65-66 and accompanying text.

sive view, some tangible thing" attempts to establish a needed safeguard against the use of inaccurate and unreliable testimony.[72]

Rule 612 grants courts the authority to make "any order justice requires" if a party does not produce the writing pursuant to an order under the rule.[73] When a witness uses an out-of-court statement to refresh his memory, the court cannot order the witness to produce the source of his refreshed memory because it is intangible,[74] thereby preventing the adverse party from having the opportunity to inspect the source of the witness' refreshed memory.[75] The ruling in *Eastover* insures that courts will maintain this authority that Rule 612 grants to them.[76] Additionally, the *Eastover* ruling insures that the adverse party has the opportunity to inspect the source of the witness' refreshed memory.[77] By holding that the parameters of Rule 612 "do not extend to out-of-court statements," the *Eastover* court establishes a safeguard which will prevent hearsay testimony from entering the courtroom under the disguise of "refreshed recollection."[78]

Rule 612 only addresses writings used to refresh a witness' memory.[79] Other methods used to refresh a witness' memory are not mentioned in the rule.[80] By determining that Rule 612 is the "only mechanism" for refreshing a witness' memory, *Eastover* disregards other methods to refresh a witness' memory.[81] The *Eastover* opinion seems overly narrow in its interpretation of Rule 612 because federal cases involving Rule 612 of the Federal Rules of Evidence, the basis for the Mississippi Rule, have permitted a witness to refresh his memory by methods other than a writing or some form of

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[72] *See supra* notes 65-67 and accompanying text.
[73] *See supra* note 58 and text accompanying note 65.
[74] *Id.*
[75] *Id.*
[76] *See supra* notes 67-68 and accompanying text.
[77] *Id.*
[78] *See supra* note 68 and accompanying text.
[79] *See supra* note 65 and accompanying text.
[80] *Id.*
[81] *See supra* note 64 and accompanying text.

tangible evidence.[82] *Eastover* establishes a needed safeguard against hearsay testimony, but the decision may be too restrictive on a court's discretion to determine whether to permit the testimony of a witness who has refreshed his memory by a source other than a writing or some form of tangible evidence.[83]

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[82] *Id.*

[83] *See supra* note 65 and accompanying text.

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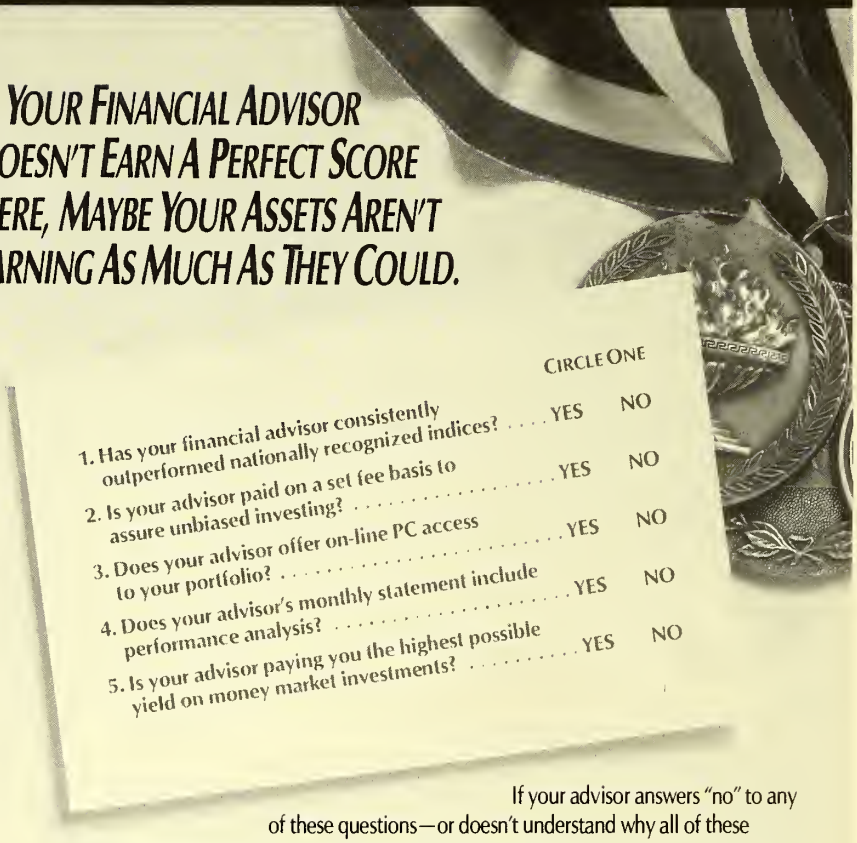

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